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Next Annual Meeting at Philadelphia, July 9, 10 and 11

PHILADELPHIA was chosen as the place and July 9, 10 and 11 as the date for the next annual meeting of the American Bar Association at the mid-winter session of the Executive Committee, which was held in that city on January 14 and 15. Sentiment as well as considerations of convenience operated powerfully to bring about the decision. As one of the representatives of the Philadelphia bar urging the claims of that city, Mr. Hampton L. Carson, former president of the American Bar Association, pointed out the reasons why it was peculiarly fitting to hold the next meeting there.

One of the most conspicuous activities of the Association during the past year, he said, had been the work of the American Citizenship Committee —a work inseparably connected with disseminating an understanding and love of the Constitution in a generation too apt to neglect it. And what could be more appropriate, he urged, than for the Association to crown and so emphasize that part of its work during the past year by holding its annual meeting at a place that was the very shrine and birthplace of our constitutional system?

Mr. Carson then proceeded to call attention to the historic places in and near Philadelphia which would not only be of profound interest to visiting lawyers but also veritable fountains of patriotic inspiration. Mr. Francis Rawle and Mr. Walter George Smith, both former presidents of the American Bar Association, reinforced the arguments of Mr. Carson, while other representatives of Philadelphia gave the fullest assurances as to its capacity to provide all necessary facilities for entertainment and meeting and for transfer to the Berengaria on Saturday, July 12, of those intending to make the trip to London.

These arguments alone would doubtless have been sufficient to secure the meeting for Philadelphia this year. But there was a further sentimental consideration connected with the proposed special meeting of the Association in London, as guests of the British and Canadian Bars. It was felt that there was a peculiar appropriateness in making a great American patriotic shrine a point of departure for a visit to the still older shrines of the Common Law in England. In brief, it appears that this is to be the Association's sentimental year, if we employ sentiment in the sense of something that is not sufficient unto itself but acts as an urge and inspiration to broader views and higher aims and more active efforts in behalf of the common good.

The claims of New York had been submitted by Mr. Charles A. Boston of that city and had been supported by various members of the Executive Committee, but as soon as Philadelphia was chosen, it was moved and adopted that the choice should be made unanimous. Representatives of Atlantic City also presented the well known facilities of that resort for a summer meeting.

The Executive Committee, among other things, approved the budget at this meeting; passed a resolution offered by Ex-Gov. Whitman of New York, strongly urging on congress legislation for income tax reductions and especially indorsing the proposed twenty-five per cent reduction on taxes on earned incomes; passed another resolution offered by Mr. Shelton of Virginia expressing appreciation of President Coolidge's recommendation to congress of prompt modernization of the procedure of the courts, through the substitution of rules of court for the present unsatisfactory regulations,

and further expressing the hope that congress would respond with the dispatch which the situation required; approved the expressed willingness of the National Conference of Commissioners on Uniform State Laws to undertake the preparation of a uniform code of criminal procedure—a project recommended by the Association's own committee on Law Enforcement—provided the undertaking could be satisfactorily underwritten; heard the chairman of the special committee on the London trip report progress; granted Secretary W. Thomas Kemp, of Baltimore, leave of absence until the end of the year, at his request, on account of ill-health and elected Mr. William C. Coleman, of Baltimore, Acting Secretary, and Mr. Edgar Tremlett Fell, also of that city, Assistant Secretary; and appointed the President, Secretary and Treasurer a special committee on program for the forthcoming meeting at Philadelphia.

The members of the Executive Committee and their ladies and the members of other committees meeting at the same time were the objects of many hospitable attentions on the part of the Philadelphia Bar. On Tuesday night there was a dinner at the Bellevue-Stratford, which was greatly enjoyed. It had been agreed that there should be no speeches or resolutions, and this agreement was only suspended in order to pass a resolution offered by Mr. Blackburn, of sympathy with Mr. Root, who had just undergone an operation in a hospital, and to request President Saner to transmit it to him. The telegram read as follows:

Hon. Elihu Root, New York City.

The honored privilege of sending the following resolution of sympathy has been conferred on me:

R. E. L. Saner, President American Bar Association.

"Whereas Hon. Elihu Root, former President of the American Bar Association, crowned also with national and international honors, America's greatest living lawyer, is confined to a hospital in New York at this moment, therefore

"Resolved that the Philadelphia Bar Association, the Executive Committee of the American Bar Association, and other representative lawyers of America, dining together as guests of the Philadelphia Bar, in token of their deep, sincere affection and respect for their suffering fellow member, convey to him this message of sympathy and their earnest, abiding hope for his speedy and complete recovery."

The dinner given to the members of the Executive Committee on the evening of January 12, by the Association of the Bar of the City of New York at their rooms in New York City was a highly successful affair. Mr. Henry W. Taft, who presided, President Saner of the American Bar Association, Mr. Chester I. Long, chairman of the General Council, and Mr. Wickersham made brief talks.

Some Professional Golden Weddings

OVER five hundred and fifty years of practice at the bar is the record of eleven lawyers of Columbus, Ohio, who were recently guests at a special banquet given by the Franklin County Bar Association. The affair was called "A Golden Testimonial Dinner," and was planned by members of the bar as a token of respect to the learning, ability and faithful service of the guests. Prominent men from throughout the state came to Columbus for the occasion, and United States Judges and members of the Ohio Supreme Court were among the three hundred guests. Mr. Phil S. Bradford, president of the Franklin County Bar Association presided and, at the conclusion of the dinner, read a letter from Attorney-General Daugherty, expressing his regret at his inability to be present, and also his respect and his high regard "for the remarkable set of men to whom you pay a deserved tribute." The remarks of the eleven guests were full of mellow humor and reminiscences and showed that advancing years had brought each of them full compensation for more youthful interests. Following were the guests of honor, with the date of their admission to the bar: Benjamin Woodburg, 1873; George B. Okey, 1871; George S. Peters, 1873; F. F. D. Albery, 1873; Ivor Hughes, 1873; Thomas E. Powell, 1865; William Z. Davis, 1862; David F. Pugh, 1869; James E. Campbell, 1865; O. W. Aldrich, 1870; B. M. Albery, 1859.

Announcement of Commerce Committee Meeting

THE Committee on Commerce, Trade and Commercial Law of the American Bar Association will hold a public meeting, in an assembly room of the Chamber of Commerce of New York, No. 65 Liberty Street, New York, Wednesday, Thursday and Friday, March 5, 6 and 7, 1924, for discussion and recommendation by all persons interested in the subjects presently enumerated as tentative agenda.

The meeting will be open to the public. The Committee cordially invites all persons interested in any of the subjects mentioned to meet with the Committee at the time stated for their consideration, and those who are unable to attend in person are requested to submit written suggestions. In due course an invitational letter with agenda attached will be mailed to persons, organizations and business interests presumed to be interested, and suggestions are now invited for matters not covered below to be added to the agenda. Business sessions of the meeting will open at 10 a. m.

TENTATIVE AGENDA

I.

Wednesday, March 5th, 1924, 10 A. M.

(a) Suggestions of other subjects and new business.

(b) Amendments to the Bankruptcy Act.

(c) Rule of Court in the administration of bankruptcy matters, recommended by the American Bar Association.

(d) U. S. Act relating to Sales and Contracts to Sell in Interstate and Foreign Commerce.

(e) Amendments to the Pomerene Bills of Lading Act. in interstate and foreign commerce.

(f) U. S. Act to make valid and enforceable agreements for Arbitration of disputes arising out of contracts, maritime transactions, or commerce among the states or territories, or foreign nations.

II.

Thursday, March 6th, 1924, 10 A. M.

(a) Industrial Court Act for the United States.

(b) Uniformity of the Law Merchant of North and South America.

(c) A general system of U. S. Commercial Courts, upon the lines of the English commercial courts.

III.

Friday, March 7th, 1924, 10 A. M.

(a) A United States Rules of the Road Act on federal highways and post roads in the interest of reducing automobile accidents and of securing unity of law applying to motorists in states other than their residence.

(b) Executive Session.

Dec. 20, 1923. W. H. H. PIATT, Chairman.

We are informed by a correspondent from Kentucky that a recent 5 to 4 decision on the race-track in that state has caused a good deal of dissatisfaction on the part of the loser of the bet and his numerous friends.

PROBLEM OF THE INTERNATIONAL COURT TODAY

Probable Line of Cleavage in the Senate--History of Court—President Harding's Suggestions at St. Louis and Examination of Their Effect—An Independent Judicial Tribunal and Not a League Court in the Sense of the Familiar Charge—Issue Presented Is the Present Court or None at All*

By MANLEY O. HUDSON
Bemis Professor of International Law in the Harvard Law School

IN his message of December 6, 1923, President Coolidge recommended to the "favorable consideration of the Senate" the proposal of President Harding of February 24, 1923, that the United States adhere to the protocol of signature of the Permanent Court of International Justice. Further initiative by the President is not required, for treaties are unlike ordinary bills introduced in the Senate, and proposals for the exercise of the Senate's function to "advise and consent" to their ratification continue before the Senate until finally disposed of.

The proposal relates so intimately to the administration of justice and to the extension of law in society that the legal profession has a special interest in the action to be taken by the Senate. This has been recognized by the American Bar Association in the resolution adopted at Minneapolis on August 31, 1923,[2] so that there can be no doubt about the attitude of the organized bar toward President Harding's proposal. But so many opportunities for confusion exist that a review of some of the arguments against the Court may serve a purpose at this time, and the acceptance or rejection of these arguments by the American people will largely depend on the attitude maintained by the legal profession.

The Court or A Court

As the question is now presented, various cleavages are possible. But it seems most probable that the enemies of the Court will follow the tactics which were followed with reference to the Covenant of the League. Few of them will dare to say that they are opposed to *a* court. They will say that they are opposed to *this* Court. And they will then proceed to offer conditions or reservations upon which the country will be asked to line up.

It should now be clear that the time is passed when people may help by being in favor of *an* international court. For the development has been such that one may as well be opposed to any international court as to be opposed to this one. No other court is in sight, and it would seem extremely unlikely that the fifty-four Powers which are now contributing to the expenses of the Permanent Court of International Justice and the forty-seven Powers which have signed the protocol maintaining it, would agree to abandon their undertaking altogether. It is therefore a question of how the United States can get into line with other states in supporting the existing Court, and this question involves a review of our recent history.

History of the Court

The treaty establishing the Permanent Court of International Justice, called the "protocol of signature," was first signed on December 16, 1920. Twenty-five ratifications were necessary to put it into effect, and the requisite number had been deposited by September, 1921. In that month, the eleven judges and four deputy judges of the Court were elected by the Council and Assembly of the League of Nations, and in January, 1922, the Court met for its preliminary session. On November 12, 1923, the Court met for the fifth time. In the two years of its existence it has dealt with nine different questions. It has already handed down eight opinions, and has refused to give an opinion in one case.

During the period in which the Statute of the Court was being framed in 1920, the Government of the United States had nothing to say on the subject. Mr. Root was a member of the Committee of Jurists that drew the Statute, but he did not act as a representative of the American Government. Throughout 1921, while the protocol was being ratified, the Government of the United States remained silent, although the United States was invited to sign the protocol. On July 13, 1922, Mr. Hughes, being pressed to take action in support of the Court, wrote to Mr. Hamilton Holt that he saw "no prospect for any treaty or convention by which we should share in the maintenance of the Court until some provision is made by which, without membership in the League, this Government would be able to have an appropriate voice in the election of the judges."

In the fall of 1922, however, Mr. Hughes was more positive. In speaking in the campaign of 1922 on behalf of the re-election of Senator Lodge, in an address at Boston on October 30, he expressed his belief "that suitable arrangements can be made for the participation by this Government in the election of judges of the International Court which has been set up, so that this Government may give its formal support to this Court as an independent tribunal of international justice." This was in effect a governmental declaration made by an administration which was submitting its policies to the voters of the country, and it was not repudiated by Senator Lodge at the time.

It was not until February 24, 1923, more than two years after the protocol of signature of the Court was drawn up, that President Harding moved in the matter. In proposing the adhesion

*Revised text of an address before the Missouri Bar Association, at Kansas City, on December 14, 1923.

1. Revised text of an address before the Missouri Bar Association, at Kansas City, on December 14, 1923.

2. "Resolved that the American Bar Association joins in what it believes to be the wise judgment of the American people, that the United States ought to become one of the supporters of the Permanent Court of International Justice at The Hague, and that our government therefore should adhere to the protocol establishing the court, in the manner set forth by the President in his message to the Senate of February 24, 1923."

of the United States to the protocol, he gave his approval to certain conditions that had been formulated by Secretary Hughes, providing for:

1. The exclusion of any legal relation to the League of Nations.
2. Participation by the United States in the election of judges by the Council and the Assembly.
3. Payment of a fair share of the expenses of the Court by the United States, as voted by Congress.
4. Consent of the United States to any amendment to the Statute of the Court.

These conditions were debated very widely throughout the country during the following March and April and May. In June, the opposition to the Court had sufficiently impressed itself on President Harding for him to seek to compromise with it.

President Harding's St. Louis Speech

In his address at St. Louis on June 21, 1923, President Harding enumerated two conditions which he considered indispensable to participation by the United States. First, that the tribunal should be "in theory and in practice, in form and in substance, beyond the shadow of a doubt, a world court and not a League court." Second, "that the United States shall occupy a plane of perfect equality with every other Power." These conditions on their face will doubtless appeal to most Americans.

But it is difficult to see how anyone can doubt that the Permanent Court of International Justice is "in form and in substance" a *world* court. Fifty-four states are contributing to the expense of maintaining it. Forty-seven states have signed the protocol, thirty-six states have ratified the protocol, and the clause conferring on the Court compulsory jurisdiction has now been accepted by twenty-one states. But aside from these formal facts, the Court is open on equal terms to all states of the world, regardless of their position with reference to the League of Nations, and regardless of their not having acted with reference to the protocol of signature. Hungary appeared before the Court prior to her admission to the League of Nations. Germany has also appeared, though not a member of the League, and last summer a German judge sat on the Court under that provision which allows every litigant state to have a judge of its own nationality sitting to hear its case. It would seem to be clear, beyond even the "shadow of a doubt," that a court maintained under these conditions is pre-eminently a *world court.*

Relation of the Court to the League

The connection between the Court and the League ought to make it as clearly impossible to call the Court a "League Court," if that term implies a lack of capacity to serve all the nations of the world as an independent judicial tribunal. There are four respects in which there is a connection between the Court and the League: first, in the creation of the Court; second, in its financial administration; third, in the election of the judges; and fourth, in the giving of advisory opinions.

(1) It is sometimes said that the Court is a "creature of the League." There is a sense in which this is true. The Statute of the Court was drawn up by a Commission of Jurists appointed by the Council of the League and was later approved by both the Council and the Assembly. But the Court was not brought into existence by an *act* of the Council or Assembly. It was brought into existence by a treaty which is a separate, distinct and independent document, forming no part of the Covenant of the League and no part of the Treaty of Versailles. So that as it exists today, the Court derives its being from no act of the Council or Assembly or any other organization of the League.

(2) As to the finances of the Court, the fifty-four members of the League now pay all of the expenses. The budget of the Court forms a separate part of the budget of the League of Nations. Regulations provide that the administration of the Court's finances shall be independent of the financial administration of the Secretariat of the League. When a dollar is received by the Financial Director of the League of Nations. a certain percentage of it must be set aside immediately to be used only for the expenses of the Court. In 1924 the entire expenses of the League of Nations will be about four and one-half million dollars. Approximately one-twelfth of this sum has been appropriated for the expenses of the Court. So that out of every one hundred dollars received by the League from any of its fifty-four Members, about eight dollars must be set aside for the Court and can be used for no other purpose.

(3) The judges are elected by the Council and Assembly of the League. But in performing this function, these bodies do not act under any provision of the Covenant. They act as *electoral* bodies named in the Statute of the Court. Once the judges are elected, neither the Council nor Assembly can remove them, nor control them in any way. So that in the discharge of their duties the judges are as independent of the Council and Assembly which elect them as the judges of the United States Supreme Court are independent of the President who appoints them with the confirmation of the senate.

(4) The Court may be asked to give advisory opinions by the Council or Assembly of the League. This jurisdiction of the Court is based on an American ideal. In several of our states, notably in Massachusetts, which was the first state to adopt the practice, the State Legislature may ask the judges of the Supreme Court for an advisory opinion. It has never been suggested that on this account the Supreme Judicial Court of Massachusetts is subordinated to the influence of the Massachusetts Legislature. Yet it is now being suggested that the International Court is somehow, because of this function, subordinated to the Council and Assembly of the League. In view of the refusal of the International Court on July 23, 1923, to give an opinion to the Council of the League on the Eastern Carelian question, as it had been requested to do, such insistence is obviously without foundation.

Independence of the Court

The four special connections between the Court and the League leave the Court thoroughly competent to perform its duties as an independent, judicial tribunal. They leave the judges wholly free of political influence. And they offer no barrier whatever to the Court's serving all the nations of the world in an impartial fashion. Admitting that the United States is not now to become a member of the League of Nations, the United States can join in the support of the Permanent Court of

International Justice without in any way involving itself in any responsibility for the activities of the Council or Assembly of the League.

It should seem abundantly plain, therefore, that the Court meets the first of President Harding's conditions. Indeed, this seems to have been Mr. Harding's opinion at the time of his St. Louis speech. But it was for the sake of "harmonizing opposing elements," and for the sake of "giving consideration to our differences at home" that Mr. Harding went ahead at St. Louis to outline a "readjustment of the existing arrangement with reference to the Court." He was careful to state that he was "not wedded irrevocably to any particular method" of readjustment, but submitted his outline "such as it is, without excess of detail, as a basis for consideration, discussion and judgment." It is not at all inconsistent with the deference due to Mr. Harding's opinions that the "outline" in his St. Louis speech should now be submitted to that consideration, discussion and judgment which he himself invited. Certain opponents of President Harding's February proposal are using the St. Louis speech as a basis for their contentions. It is therefore necessary that his suggestions be clearly understood and that they be submitted to close examination.

President Harding's suggested "readjustment" would effect three changes with reference to the Court. These relate to: (1) the election of the judges; (2) the financial management of the Court; and (3) the privilege of requesting advisory opinions.

Should the Court Be Made Self-Perpetuating?

As to the first of these changes, President Harding put forward the idea that the Court might be made self-perpetuating by empowering the members of the Court themselves to fill any vacancy that may arise, either with or without nomination by members of the Permanent Court of Arbitration. This suggestion would have the effect of taking from the Council and Assembly of the League their functions with reference to the election of the judges. And it would give the judges themselves the power to elect their successors.

The idea of a self-perpetuating court is something quite new in judicial history. So far as the writer's researches go, there has been no instance in modern history of a self-perpetuating court. Complaint was made at the time of the French Revolution that the French courts had become self-perpetuating, but this was not literally true. It is difficult to conceive of anything more un-American than to confer on a small group of eleven men a power which no people have as yet been willing to confer in the administration of justice. It would smack of a degree of super-government, which has never been possessed by or proposed for either the Council or Assembly of the League of Nations.

Suppose a proposal were made, for instance, that the Supreme Court of the United States should be made self-perpetuating. Even those who are now alarmed by the Borah and La Follette proposals as to the Supreme Court would have no hospitality for such an idea. It is even more difficult to think of a self-perpetuating International Court. We may assume that the judges of an international court would act in a high-minded way in choosing their successors. But they would be less well-equipped even than judges of a national court for such a task. For the justices of the Supreme Court of the United States in exercising such a power would have the advantage of a large acquaintance with the lawyers from whom the judges must be recruited. But the number of lawyers arguing before the International Court is very limited, and even if a judge were well acquainted with the lawyers of his own country, he would not be likely to know so well the lawyers of other countries.

It is difficult to believe that the American people would ever consent to participation in a *self-perpetuating* court. But even if the American people should find such a suggestion acceptable, other peoples of the world whose nationals are not today among the judges would undoubtedly object to it. Can anyone imagine this proposal being put forward by the United States if there were no American among the judges of the International Court? In July, 1922, Mr. Hughes stipulated that the United States should participate in the selection of the judges. In February, both President Harding and Mr. Hughes laid it down as essential that the United States should have a voice in electing the judges. But the effect of making the Court self-perpetuating would be to deprive forty-three other states of the voice which they now have in electing the judges. For the United States would be asking that the states whose nationals are not now sitting on the Court should give up a voice which they already have, and should allow the judges of the future to be selected without their participation in any way. We should be asking Haiti, Peru and Siam, for example, to accept a change which would deprive them of any participation in the selection of the immediate successors of the present judges. In view of the fact that for thirty years the effort to establish an international court was thwarted by the contest between small Powers and great Powers, it would be difficult to think of a suggestion more unacceptable to the small Powers. To make the Court self-perpetuating would be to destroy the confidence in the Court now entertained throughout the world.

What advantages might be expected from the adoption of such a proposal? Surely no one would contend that the Court would be better able to discharge its functions if it were made self-perpetuating. No one would contend that it would have a larger place in popular loyalty. The only advantage achieved would be the spiritual satisfaction which might come to certain American opponents of the League of Nations.

Moreover, this suggestion would disturb a delicate compromise which was reached by the Committee of Jurists in 1920 on the initiative of Mr. Root. Last February, Mr. Hughes stated in his letter to the President that it would be "impracticable to disturb the essential features of the system" of electing the judges. It would be as impracticable today as then.

Financial Administration of the Court

The second item of President Harding's outline for "readjustment" related to the financial management of the Court. He proposed that the fixing of the compensation of the judges, the control of expenditures, the apportionment of contributions, and other similar matters be taken away from the Council and Assembly of the League, and be trans-

ferred either to the Permanent Court of Arbitration or to a commission designated by the member nations. He pointed out that it would be an incidental effect of this proposal to "avert the admitted unfairness of the present system which imposes a tax upon the members of the League who are not subscribers to the Court." Seven members of the League have not signed the Court protocol, and yet they do contribute to the expense of maintaining the Court. But none of these states has ever made any complaint about this, and if any "unfairness" exists, they do not aver it. It seems more probable that these states consider that the advantage of having the Court in existence, at all times open to them as litigants, and the advantage of voting in the Assembly in the election of the judges entirely compensates them for the payments which they make. So that the incidental effect noted by President Harding presents no reason whatever for his proposal.

The suggestion that the financial management of the new Court might be transferred to the old Court of Arbitration, established in 1899, seems to be based on a misconception as to what that Court of Arbitration really is. It is not in any sense an organized body. It is merely a panel. The members of the Court of Arbitration never meet. So that if any such function were given to them, it would have the effect of changing the character of the Court of Arbitration as it now exists.

The financial affairs of the Court of Arbitration itself are handled by an administrative council composed of the diplomatic representatives at The Hague. It would be possible to confer on this administrative council the financial management of the new Court. But what would be the advantages of such a change? It would simply duplicate machinery which already exists for collecting money from the various governments of the world. It would duplicate the work which is now being done satisfactorily at Geneva to supervise expenditures and to apportion fairly the contributions of the various states.

In the League of Nations, for instance, it has proved a difficult matter to arrive at a satisfactory *barême* for allocating the expenses. It is no less difficult to keep the quotas paid up to date. Why should these international necessities be made more burdensome? For fifty-four peoples of the world, the proposal to transfer the financial management either to the old Court of Arbitration or to the administrative council of diplomatic representatives at The Hague would have no more merit than a suggestion would have for Americans that there be a separate budget, a separate money-collecting agency and a separate financial administration for the Supreme Court of the United States.

The present arrangement, under which the expenses of the International Court are met out of monies collected by the League of Nations and turned over to the Registrar of the Court, does not in any sense make the Court dependent on political organs of the League. One might as well argue that the Supreme Court of the United States is dependent on the legislative and executive branches of our Government, because the salaries of the judges have to be voted by Congress and collected by the Secretary of the Treasury.

President Harding's suggestion would have only the advantage of giving the United States a larger share in controlling the Court's finances. But Secretary Hughes' conditoins of February would seem to have adequately safeguarded America's position in this respect. His third condition was that the United States would bear "a fair share of the expenses of the Court as determined and appropriated from time to time by Congress." In thus keeping it within the power of Congress to determine how much America should pay, it is obvious that Mr. Hughes has provided for an American voice in the control of the Court's finances. If a larger voice should be desired, this condition as framed by Mr. Hughes might be enlarged.

It is to be noted that American contributions to the expenses of the Court would not have to be sent through the Financial Director of the League of Nations at Geneva, but could be sent directly to the Registrar of the Court at The Hague. A precedent exists for this in the method by which Germany contributes to the expenses of the International Labor Organization; for her contribution is sent to the Director of the International Labor Office without passing through the hands of the Financial Director of the League of Nations.

Should Advisory Opinions Be Abolished?

President Harding's third suggestion was that "the exclusive privilege now held by the League to seek advisory legal guidance from the Court might either be abolished, or, more wisely perhaps, be extended to any member or group of member nations." A consideration of this suggestion may be based on the actual history of the work of the Court to date. It has dealt with nine questions. Eight of these have come before it as requests for advisory opinions from the Council of the League. Of the eight requests, three have related to the constitutional structure of the International Labor Organization; one related to a dispute between Great Britain and France; one to a dispute between Finland and Russia; one to a boundary dispute between Czecho-Slovakia and Poland; and two to the application of the Polish minorities treaty. Thus in a brief period of two years, the work of the Court has already shown how useful it is to have advisory opinions from the Court, both in connection with the functioning of the League of Nations and in connection with the political handling of international disputes. To abolish such jurisdiction of the Court would be all but a calamity. Fifty-four peoples of the world, who represent two-thirds of the world's population, would find it difficult to understand why their attempt to organize the peace of the world should not be aided by a growing body of international law, as expounded in the advisory opinions of the Court. In the task of international organization, it is inevitable that many questions of a constitutional nature will arise. These questions can only be handled smoothly and expeditiously if the Court may be called upon from time to time to straighten out legal tangles.

Moreover, the fifty-four peoples who are attempting to develop international law along such lines as the mandates and the protection of racial and religious minorities, will doubtless insist on maintaining in some form the Court's jurisdiction to give advisory opinions. Even in connection with the handling of political disputes by the Council

and Assembly, it is most valuable to have the assistance of the Court on incidental legal questions which are bound to arise.

The objection to this jurisdiction of the Court, which lead to President Harding's suggestion, is based on a notion that the Court is somehow the "private attorney" of the League of Nations. If such a suggestion had any merit in it before the Court's refusal to give an opinion in the Eastern Carelian case, it is now wholly without foundation. For the Court has demonstrated, beyond peradventure, that it is going to perform this function in a strictly judicial manner, and that wherever an advisory opinion cannot be given according to the limitations or judicial action, it will refuse to act altogether.

If advisory opinions are not to be abolished, President Harding's suggestion would have the privilege of requesting them extended so that any nation might ask for an advisory opinion. But so long as the Court does not have complete obligatory jurisdiction, it is obviously impossible to provide that in case of a dispute between two nations, either of them may ask for an advisory opinion from the Court. This was in effect what was attempted by Finland in connection with the East Carelian dispute, although Finland did go through the Council of the League, and her request was put forward as a request from the Council.

Equality of Voting Power

President Harding also suggested as a condition of American participation that the United States should "occupy a plane of perfect equality with every other Power." He proposed no specific measures to this end in his "outline." But he alluded to the removal of "the disparity in voting as between a unit nation and an aggregated empire which now maintains in the Assembly of the League." Denying that he himself had any apprehensions about the existing situation, he would seem to have insisted vaguely that steps be taken which would give the United States the same voting strength in the Assembly, in connection with the election of judges, as is enjoyed by all of the seven British peoples who are members of the League.

A proposal in this direction by the United States would have the effect of our saying to Canada or to the Irish Free State something as follows:

> It is true that you have achieved a very independent position as a member of the British Commonwealth. After a generation of effort you have placed yourself in a position where you can exercise control over your own foreign policy and enjoy a real international status. But the United States does not propose to deal with you on this basis. The United States insists that all the British nations are one single unit. We insist that they must act together, vote together, and keep the historical character of a united empire.

Such a position would not in the least correspond with the facts as to the relations among the various British peoples during the past decade. The conception of an "aggregated empire" is wholly obsolete, and most of the British peoples are in fact and in truth independent and act independently. What has the United States to fear from recognizing this fact? In the Council of the League, we would have one vote as the British Empire has one vote. In the Assembly it is quite probable that the United States would support candidates for judgeships who would be supported by the various British peoples, for we and they have a common system of law, and together we would be in a minority with reference to the countries which have a different system of law.

The United States would seem to have everything to gain by the separate participation of the British Dominions in international affairs. The fact that the Dominions do have an international status greatly assisted in solving the Irish problem and in putting the Irish Free State on the road to prosperity. There is every reason why the United States should encourage independent action by Canada, for instance, and the Senate's reservation to the Halibut Treaty will doubtless soon be withdrawn. But whether we like it or not, it is a fact that the British Dominions have achieved a large degree of independence. We cannot ignore this fact by attempting to deprive the Dominions of the votes that they already have. Nor does it seem practicable for the United States to ask extra votes in the Assembly which have not been given to other unit nations.

Effect of President Harding's Suggestions

All of the "readjustments" suggested by President Harding would seem to be unnecessary from any international point of view, impracticable to achieve, and undesirable on their own merits. They would in no way improve the present situation so as to increase the usefulness of the Court, and they would have no other advantage than to meet the objections of a few Americans whose attitude is based on opposition to the League of Nations. It is difficult to see how the situation has been improved by President Harding's address at St. Louis, therefore, and the proposals originally contained in his message of February 24 still present the only practicable method of procedure.

It is interesting, however, to note the effect which President Harding's address at St. Louis has had on the opposition to the Court. It must have been perceived that the outline included changes which it would be impossible to effect, either in the United States alone, or, after acceptance by the United States, in other countries. For President Harding's address was greeted with utter coldness in European countries, and no disposition appeared on the part of other governments to meet any of his proposals half way. But certain opponents of the Court in America immediately seized upon his proposals as a method of disposing of the whole question.

For instance, Senator Borah was repeatedly quoted as saying that he would vote for giving American support to the Court on the conditions laid down by President Harding at St. Louis. But in the *Ladies Home Journal* for October, Senator Borah stated that "self-perpetuating bodies are contrary to democratic thoughts and ideals," and therefore he concluded that "the suggestion that the Court should fill its own vacancies . . . would not prove acceptable or wise" and "would not be satisfactory."

Of course Senator Borah has always felt it necessary to speak in favor of *a* court. To this extent he must follow the clear current of American opinion for a generation. While the Permanent Court of International Justice was being set up, he had very little to say on the question. Now that the Court is in being and functioning, he would

apparently sweep it away with one brush of the hand and proceed to erect a new court, apparently with little consideration for what people in other countries may think.

Senator Borah's Proposals

To erect his new court, what does he propose? He proposes first, "the creation of a permanent, competent body of international law." Before this "first step" could be accomplished, Senator Borah would long since have passed away. If we must wait until we have a competent body of international law, we might have to wait for generations. We did not follow such a course in setting up the Supreme Court of the United States.

Senator Borah makes only one other proposal about the new court. He says that "provision must be made in the articles creating it for the permanent presence of an American judge upon its bench." In other words, Senator Borah would go back some two decades in the progress of this movement. If an American judge must always be on the bench, then an English judge must always be there, also a French, an Italian, a Japanese, a German and a Russian. And any other country might take the same stand.

Senator Borah also objects to the present Court because it is "merely an arbitration tribunal." He seems to have given himself entirely to a tendency which is now so current, of sharply distinguishing between arbitration and adjudication. But if he would go through the records of arbitral tribunals for the last fifty years, it is possible that his judgment in this respect would be revised. For arbitral tribunals, like judicial tribunals, proceed on what they consider to be the law. The latest example of this is the very excellent opinion of Judge Parker, as umpire, with reference to the Lusitania cases before the Mixed Claims Tribunal between the United States and Germany.

Senator Borah would like a court to be given "compulsory jurisdiction." He fails to mention in his speeches and his articles the large amount of compulsory jurisdiction which the Permanent Court of International Justice already has. The optional clause giving the Court compulsory jurisdiction has now been accepted by twenty-one states. And if Senator Borah would build on the existing institution, his desire for compulsory jurisdiction could easily be accomplished by inducing the United States to follow the example of Brazil and to accept the optional clause giving the Court compulsory jurisdiction for five years on condition that the clause is also accepted by the Powers permanently represented on the Council of the League of Nations.

Senator Pepper's Proposal

A different attitude toward President Harding's February proposal is now being taken by a group of Senators who have favored the Court and who would like to find a way of meeting the view of Senators who are irreconcilably opposed to the League of Nations. Senator Pepper is probably the most effective member of this group. In addressing the Pennsylvania League of Women Voters on November 14, Senator Pepper is reported by the *Philadelphia Ledger* to have said:

> Everything would be much simpler if the nations that have set up the Court would amend the protocol under which it exists so that there would be an electoral council and electoral assembly, and would make eligible for voting in the assembly every nation which is eligible for membership in the League, whether it is a member of the league or not. Then it would have real popular voting.

It seems to be along some such line that an attempt will be made in the present Congress to work out a compromise. On December 10, Senator Lenroot introduced such a resolution. The proposal of Senator Pepper may, therefore, be examined in detail.

In speaking of "eligible" nations, Senator Pepper must have referred to states named in the annex to the Covenant of the League which have not yet become members of the League. These are the United States, Ecuador and the Hedjaz. It is difficult to see how the addition of Ecuador and the Hedjaz, both small and not prominent states, would add to the popular character of the voting. Presumably, the electoral council and the electoral assembly would be organized as the Council and Assembly of the League are now organized, containing representatives of the same powers.

But to make this change in the name of the electoral bodies, it would be necessary to amend the Statute of the Court. As the Statute does not make any provision for its own amendment, and as no organ of the League of Nations has any power to amend it, any change in its provisions must be effected by the ordinary procedure for making a new treaty. This means that all the forty-seven states which have signed the Court protocol would have to enter into a new treaty to change the name of the electoral bodies choosing the judges. Unanimous action by the forty-seven states would be required, and for most governments such action would necessitate parliamentary participation. It is a cumbersome procedure at best, and it would involve great delay, even if it should succeed.

But the question arises, why should forty-seven states be put to the necessity of putting into operation their treaty-making machinery, why should most of them have to go before their parliaments, simply in order that the United States may remove a purely technical objection to putting into operation its treaty-making machinery?

Moreover, it would seem necessary to have an international conference to formulate an amendment such as Senator Pepper would propose. While the amendment might be formulated through the organs of the League, it would hardly be for the United States to propose that this procedure be adopted.

Senator Pepper's proposal would involve much delay, therefore. It might involve embarrassment to many Powers, and it might involve a danger of upsetting a delicate international adjustment. What advantages would it have? It would not make the Court more efficient. It would not enable the Court to do its work any better. It would not satisfy any insistance in other countries of the world, unless it would encourage the Soviet government of Russia in its effort to secede from international society.

The three leading suggestions which would modify President Harding's proposals of last February—President Harding's speech at St. Louis, Senator Borah's proposals and Senator Pepper's attempt at compromise—leave the situation unad-

(*Continued on page 49*)

GRAY'S INN

Brief Sketch of Institution Which Has Played Such an Important Part in the History of the British Bench and Bar—Lively and Interesting Old Customs—Early Systems of Legal Education—Francis Bacon—Expensive Honors

By Paul D. Cravath
Of the New York City Bar, a Bencher of the Inn

GRAY'S INN IN 1914

THE origin of Gray's Inn, like that of the other Inns of Court, is clouded in obscurity. It probably existed as early as the reign of Edward I, for in 1292 it was ordered that the law courts should thereafter sit permanently in London instead of following the King over the country, and also that a certain number of apprentices of the law and attorneys be in attendance upon the courts.

Gray's Inn was originally the old Manor House of the Manor of Portpoole which belonged to Lord Grey de Wilton, a Chief Justice of Chester. The manor was north of Holborn Street and outside the city limits. Its fields stretched away to the north and its walks lost themselves in the open country. It was in this Manor House which came to be called "Greysyn" that students from Barnard's Inn and Staple's Inn came to meet and were ultimately known as the "men of Gray's Inn."

For a century the Society held its meetings in the Inn without apparently taking any formal lease of it. In 1516 a lease was taken for a rental of ten shillings a year and a fine of six pounds, thirteen shilling and four pence.

In those days the daily life of the Inn was of a lively and interesting character. Fortescue said, "there is in both the Inns of Court and the Inns of Chancery a sort of academy or gymnasium fit for persons of their station; where they learn singing and all kinds of music; dancing and such other accomplishments and diversions, which are called revels, as are suitable to their quality, and such as are usually practiced in court." Before the revolution it was customary for the sons of the nobility and of the wealthy to belong to an Inn of Court as a preparation for a political career. The rigor of the collegiate training was unsurpassed and the discipline was so excellent that there was "scarce ever known to be any piques or differences, any bickerings or disturbances among

them." During the early period, and particularly during the reign of Elizabeth, Gray's Inn was the most popular and best attended of the four Inns of Court, the number of its members in 1585 being more than double that of any other Inn.

The members lived very much of a community life. They met in the Hall for breakfast, dinner and supper and also for their lectures and moots. In Chapel they assembled for common prayer both morning and afternoon and at Christmas and sometimes at other seasons they joined in the revels and masques in the Inn or at the King's Court. There is ample evidence of the seriousness of the collegiate life of Gray's Inn. Among the State Papers is a report by Sir Nicholas Bacon, the father of the great Lord Bacon, which sets out in detail the system of education. The youngest members of the Inn were called Inner Barristers since they sat in Hall on its inner benches or forms. Seven years as an Inner Barrister was the preparation required to entitle a member to become an Outer or "Utter" Barrister and to sit on the outside benches in Hall. At the end of five more years with hard work the student became an Ancient and could thereafter practice in the Courts at Westminster. Finally the great honor of a Reader or Bencher might be attained. The result of these long years of apprenticeship was that the students "did not get into practice in that condition of adolescence in which young gentlemen sometimes appear now."

The studies were carried on by "bolts," moots and Readings. The Inner Barristers did the "bolting" by answering particular questions of law for Outer Barristers who thereby discovered how much work the Inner Barristers were doing. The moots were held in Hall before the whole Society, with one of the Benchers presiding and all proceedings were modeled on those in the Courts. Pleadings in Norman French were memorized and repeated by an Inner Barrister as a Junior to an Outer Barrister acting as the King's Counsel. The Readings were lectures delivered by the members of the Society upon their election to the position of Bencher, the highest honor in the Society. Not every one wished to be a Reader, for the honor carried great expense. Feasting was one of the features of the Inn. The practice was that a Reader must entertain every one for several days before he read, and besides he generally brought a throng to the Hall to hear him read. The cost to a Reader became so great that by an order in Pension a limitation of £300 (equivalent to £1,500 in present day money) was put upon the cost of a Reader's feast.

But the life of Gray's Inn was not all "bolts" and moots and Readings. There was more foundation for the saying that a student "eats his way to the Bar" than there is at the present time. Under the Tudors and the Stuarts there were "Grand Weeks" in every term and at all times there was plenty of reveling and sports, like barriers, bowls and cockfighting.

Francis Bacon was in his time the chief spirit in all revels and masques. The Gesta Grayorum contains an account of a very famous masquerade in 1594 which began as early as All Hallow's day. It had been intended, it appears, to have but a single masque, but, it is recorded, at "the conclusion of the first grand night the performance whereof increased the expectation of the things to ensue in so much that the common report amongst all strangers was so great and the expectation of our proceedings so extraordinary that it urged us to take upon us a greater state than was first intended." At Christmas a Prince of Portpoole was appointed and also a Lord of Misrule, and the two of them kept up the revelling until the end of January.

At the Christmas celebration the actors and crowd became so rough and boisterous that the Ambassador who had been invited from the Inner Temple withdrew offended, and thereafter, so the record reads, "It was thought good not to offer anything of account save dancing and revelling with gentlewomen."

A sumptuous masque was also given to the Court of Queen Elizabeth and in the palmy days of James I upon the marriage of the King's daughter a masque was given by the four Inns at a cost of £20,000 in money of that time. The masques were costly not only to the Inn but also to the members themselves. Generally the Hall furniture had to undergo repairs and as a result of bonfires parts of the buildings and the chambers were sometimes destroyed. Lord Bacon himself spent large sums of money on the masques and enjoyed himself so thoroughly that his mother wrote, "I trust they will not mum and sinfully revel at Gray's Inn."

Great attention was paid to dress. In 3 and 4 Philip and Mary it was ordered that none except Benchers or Knights should wear in their doublet or hose any bright colors, except scarlet or crimson, or wear velvet shoes or feathers or ribbons in their caps. No one else "under the degree of a knight could wear a beard of three weeks growing upon the pain of forty shillings fine."

The Pension (the governing body of the Inn), it appears, did not approve of the members marrying, for in 42 Elizabeth it was ordered that "none of the officers of this House shall have or enjoy his office any longer than he shall keep himself sole and unmarried, except the Steward, the Chief Butler and the Chief Cook." The records show also some curious orders as to conduct in Hall. It was ordered, for example, "that no fellow of the Society should stand with his back to the fire," nor "go down to the kitchen to fetch up his own meat."

The Revolution and the supremacy of the Long Parliament in the seventeenth century caused great changes in the life and character of the Inns of Court and in particular in Gray's Inn. Mumming and masquerading, if they took place at all, were shorn of their former splendor. And in 1649 the Long Parliament made an order that the Benchers should not "permitt any publique revellinge or gaming such as had gone on at that time from time immemorial." Probably it is the result of this restriction that in 1655 "the disorders in the Hall were observed much more than in former times, by throwing of bread, knocking and breaking of pots and other uncivil behaviour."

After the Revolution the Inns of Court never recovered their popularity as centers of learning and social amenity for young men who, without needing to seek briefs, hoped to play a part in public life. Gray's Inn suffered from the constant encroachment of buildings around and to the north of it. The ancient quiet of its chambers and its courts was disturbed. The view from its windows and walks lost much of its rural charm. The Gardens, however, which were the pride of Lord Bacon and largely the result of his own efforts, were always carefully kept and though the popularity of the Inn as a center of learning declined, the charm of its Gardens and its central position brought inside its gates many men who were not even members of the Inn. Dr. Johnson, Goldsmith and Robert Southey all resided in Gray's Inn in the last half of the eighteenth century. Haw-

thorne, after having visited the Inn, wrote: "After leaving Lincoln's Inn we looked in at Gray's Inn which is a great quiet domain, quadrangle beyond quadrangle close beside Holborn and a large space of greensward enclosed within it. Nothing else in London is so like the effect of a spell as to pass under one of these Archways and find yourself transported from the jumble, tumult, uproar as of an age of week days condensed into the present hour, into what seems an eternal Sabbath."

During the last century, the life of the Society has been uneventful. The "bolts" and Readings were gradually replaced by work in chambers and by lectures under the direction of the four Inns of Court. The revels and masques are glories of the past and instead of a Grand Week in each term there is but one Grand Night a term. Despite these changes many fine old customs of Tudor and Stuart days still survive. The Panyerman still announces dinner by proclaiming the word "manger" in each of the three courts. Before the Grand Night dinners the Chief Butler still passes about bits of toast and a cup of wine in simulation of the holy sacrament. At the Benchers' table on Grand Nights, beakers presented to the Inn by Queen Elizabeth herself are passed to all the occupants of the Benchers' table and each Bencher and guest quaffs the beverage and announces with due solemnity that he is drinking "to the glorious, pious and immortal memory of Good Queen Bess."

The noble Hall of the Inn, which dates from the Tudor period contains an interesting series of portraits, beginning with portraits of Queen Elizabeth, Lord Bacon and his father Sir Nicholas Bacon, all painted from life and ending with portraits of Lord Birkenhead in his Lord Chancellor's robes and other Benchers of the present day.

In recent years Gray's Inn has acquired increased prominence due in great measure to Lord Birkenhead, the late Lord High Chancellor, who in his active and enthusiastic patronage of the Inn has emulated his distinguished predecessor on the woolsack Lord Bacon. During the last decade the Society through its moots and its sociable character has again reached the relative numerical strength of its most famous days. More students have been called to the Bar in the last few years through Gray's Inn than through any other of the Inns of Court. The Chairman of the Committee on Legal Education who supervises the admission of the candidates to the Bar is the Right Honorable Sir Richard Atkin, one of the Lord Justices of Appeal who is a prominent and active Bencher of Gray's Inn.

During the war, two Americans received the honor of election to the Bench of Gray's Inn as Honorary Benchers for life, one, James M. Beck, now Solicitor General of the United States, and the other, Paul D. Cravath, who, at the time of his election during the last year of the War, was temporarily a resident of London, as counsel to the American Mission to the Inter-Allied Counsel on War Purchases and Finance.

The Benchers of Gray's Inn at the present time are:

H. R. H. The Duke of Connaught, K. G., K. T., G. C. B.,
H. R. H. Prince Arthur of Connaught, K. G., K. T., G. C. V. O., C. B.,
The Rt. Hon. William Morris Hughes, K. C. (Honorary),
The Rt. Hon. Lord Clyde (Honorary),
John Rose,
His Honor James Mulligan, K. C.,
Sir Miles Mattinson, K. C.,
Sir Lewis Coward, K. C.,
Charles Alfred Russell, K. C.,
The Hon. Sir Montague Lush,
Thomas Terrell, K. C.,
William Tyndall Barnard, K. C.,
The Right Hon. Sir Dunbar Plunkett Barton, Bart., K. C.,
The Right Hon. Sir Henry Edward Duke,
The Right Hon. Lord Glenavy,
Herbert Francis Manisty, K. C.,
Edward Clayton, K. C.,
William John Reynolds Pochin,
Arthur Edmund Gill,
The Right Hon. Sir Richard Atkin,
The Right Hon. Sir William Patrick Byrne, K. C. V. O., C. B.,
The Right Hon. The Earl of Birkenhead,
His Honor Judge McCarthy,
Sir Montagu Sharpe, K. C., D. L.,
The Hon. James Montgomery Beck (Honorary),
Paul D. Cravath (Honorary),
George Rhodes, K. C.,
The Hon. Sir Arthur Greer,
Timothy Michael Healy, K. C., Governor General of Ireland,
The Right Hon. Sir Robert Horne, G. B. C., K. C., M. P.,
His Honour Judge Ivor Bowen, K. C.,
His Honour Judge Charles Herbert-Smith,
Sir Alexander Wood-Renton,
William Clarke Hall,
The Hon. Mr. Justice Cecil Walsh,
Robert Ernest Dummett,
The Right Hon. Sir Hamar Greenwood, Bart., K. C.,
The Right Hon. Mr. Justice Samuels,
William Courthope Townsend Wilson, K. C.,
Walter Greaves-Lord, K. C., M. P.,
George Darell Keogh,
Bernard Campion, K. C.,
Sir Harold Smith, K. C., M. P.,
The Right Hon. Lord Morison.

The Piece-Work System for Judges

"Mr. Justice Sankey, responding to the toast 'The Bench and the Bar,' at a dinner of the Carpenters' Company at their hall on Thursday, the 15th inst., said that . . . he often wondered which of two things he ought to put the most reliance upon, the figure which the public imagined a successful barrister was earning, and the figure the judge thought he himself would earn if he went back to the Bar. The real difference, as he had found when he was put on the Bench, between the Bar and the Bench was that the barrister was paid by piece work, the judge was paid by day work. It was said—with what truth he did not know—that this was not a good system. Heaven alone knew what might happen in the next six months—it might be all altered. It was said that piece work would be an extremely good way of paying the judges, that some were slow, whilst there might be the danger that others might be too quick, and, having decided a case before they really understood what it was all about, they would get reversed in the Court of Appeal. It was suggested that a judge on piece-work who should happen to be so reversed ought to return his fees for deciding that particular case."—*The Law Times*, Nov. 24, '23.

Moscow Undesirables

MOSCOW, Dec. 26.—The Soviet government has begun to clean up Moscow and rid the city of all undesirable residents of both sexes.

If true, this procedure will furnish a unique case of governmental self-expulsion and self-extermination.

The Eighteenth Amendment and Volstead Act, paradoxical as it may seem, have stimulated more people to write and speak than any product of recent years.

SUMMARY JUDGMENT UNDER NEW YORK RULES

How Justice Is Expedited by Provision Adapted from the English and New Jersey Practice Acts Which Permits Judgment on Plaintiff's Motion and Affidavit Unless Defendant Shows Facts Entitling Him to Defend

By THOMAS MCCALL
Of the New York City Bar

ONE of the most common—and well based—complaints against the law is the delay in obtaining one's day in court. Especially loud is the complaint of a litigant when, with a just cause, he is compelled to wait for years before his hearing is had, although it is absolutely certain that the defendant will not be able to sustain his pleaded defense.

At common law and under many of the Statutory Practice Acts, any pleadings by way of a plea or answer sufficient on their face will suffice to stay proceedings until the cause of action is reached for trial in due course.

The New York Rules of Civil Practice have a rule which has become of great benefit to litigants with just causes. This Rule is known as Rule 113. It is based upon the English Practice Act (Order 3, Rule 6; Order 14, Rule 1) and the New Jersey Practice Act (Section 4, paragraph 57), which provide for a summary judgment, and became effective October 1, 1921. It is binding upon all the Courts of New York, and all Justices and Judges thereof, except the Court for trial of impeachments and the Court of Appeals.

The rule reads:

> Rule 113. Summary Judgment. When an answer is served in an action to recover a debt or liquidated demand arising,
>
> 1. on a contract, express or implied, sealed or not sealed; or
>
> 2. on a judgment for a stated sum; the answer may be struck out and judgment entered thereon on motion, and the affidavit of the plaintiff or of any other person having knowledge of the facts, verifying the cause of action and stating the amount claimed, and his belief that there is no defense to the action; unless the defendant by affidavit, or other proof, shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend.

Many cases have arisen in New York on the construction of this act. It may be that it is too early to consider the development of the law based upon this somewhat novel procedure which permits a judge to inquire by affidavits, or other proof, matters clearly extraneous to the pleadings themselves, as to whether or not the defendant has any defense, but it is certain that the rule is avoiding much unrighteous delay.

From the mere reading of the rule (although there appears to be no case in point) it seems clear that the complaint cannot be stricken out under Rule 113. In New York "The first pleading on the part of the plaintiff is the complaint." (Civil Practice Act, par. 254.) The rule applies only to the answer and by judicial construction to a counterclaim.

Mr. Justice Greenbaum, in Chelsea Exchange Bank v. Munoz, 202 App. Div. 702, held that the rule applied to a counterclaim as Section 260 of the Civil Practice Act reads:

> The only pleading, on the part of the defendant, is an answer.

Section 261 reads:

> The answer of the defendant must contain:
>
> 1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.
>
> 2. A statement of any new matter constituting a defense or counterclaim.

The learned Justice, after citing the foregoing provisions of the Civil Practice Act, said:

> A strict reading of the provisions just quoted would seem to justify a reasoning that since the counterclaim is embraced in an answer, and that since an answer may be stricken out under Rule 113, that rule is alike applicable to a counterclaim and to a defense.

The first case to be considered by the Appellate Division under the Rule is Dwan v. Massarene, 199 App. Div. 872 (although some cases had been considered at Special Term of the Supreme Court and in the Municipal Court of the State of New York under the Rule). In this case Mr. Justice Page, speaking for the Court, carefully expounded the Rule. (It may be here stated that Mr. Justice Page was Chairman of the Convention which prepared and adopted the existing Rules of Civil Practice.) After giving the historical reasons necessary for the adoption of the Rule, and referring to the English and the New Jersey Practice Act, including four cases in New Jersey Law Reports, the Court considered the query as to the constitutionality of this provision. Judge Page said at page 879:

> The Constitution provides (Art. 1, Section 2); "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever." It secures the right to a jury trial of the issues of fact in those cases where it had been theretofore used. This did not deprive the Court of the power to determine whether there was an issue of fact to be tried; but if the Court determined there was such an issue, it must be tried by a jury. A false denial interposed for the purpose of delay did not create such an issue, any more than a false affirmative defense. . . . In Massachusetts a statute requiring an affidavit of merits to be filed in an answer in an action on a promissory note was attacked as unconstitutional on the ground that the defendant had a right to compel the plaintiff to produce his proof and have the judgment of the Court upon the effect and sufficiency of that proof, and hence the statute deprived the defendant of his right to a trial by jury. The opinion asserting the constitutionality of the Statute affords illuminating reading for those who argue for the constitutional right of the defendant to delay a just cause by a false denial. (Hunt v. Lucas, 99 Mass. 404.)
>
> The power is given to the Court, but it is needless to say that it must be exercised with care and not extended beyond its just limits. The Court is not authorized to try the issue, but is to determine whether there is an issue to be tried. If there is, it must be tried by a jury. Plaintiff's affidavit must state such facts as are necessary to establish a good cause of action. It will not be sufficient if it verifies only a portion of the cause of action, leaving out some essential part thereof. It must state the amount claimed and his belief that there is no defense to the action. The defendant must show that he has a bona fide defense to the action, one that he may be able to establish. It must be a plausible ground of defense, something fairly arguable and of a substantial character. This he

must show by affidavits or other proof. He cannot shelter himself behind general or specific denials or denials of knowledge or information sufficient to form a belief. He must show that his denial or his defense is not false and sham, but interposed in good faith and not for delay.

The New York Court of Appeals, in passing upon the case of General Investment Co. v. Interborough Rapid Transit Co., 235 N. Y. 133, upheld the constitutionality of the Act in affirming an order of the Appellate Division for the First Judicial Department, which affirmed the Supreme Court (118 Misc. 11, 200 App. Div. 794), in granting summary judgment.

This action was upon certain notes, and, to quote from the case:

> The sole denial by defendant to the allegations of the complaint was of any knowledge or information sufficient to form a belief that plaintiff is and was on the date of maturity the owner and legal holder of the five notes, the subject of the action.

Mr. Justice Hogan said at page 139:

> A defendant may in all cases successfully oppose an application for summary judgment under the rule by satisfying the Court by affidavit or otherwise that he has a real defense to the action and should be allowed to defend. In order that a plaintiff shall succeed on such a motion it must appear from the moving papers and answering affidavits that the defense or denial interposed is sham or frivolous. If a defendant adduces facts upon the hearing of the application which constitute an apparent defense, he should be allowed to defend. Such is the law in England under a like rule of the Supreme Court of Judicature (citing Act and cases) and a conservative guide for adoption by our Courts.

After stating the case and referring to the substance of the affidavits filed in support of the motion, the learned Justice continued and said (page 142):

> Counsel for defendant asserts "It does not contend that Rule 113 is *per se* unconstitutional. It does claim, however, that the interpretation given to this Rule is directly in conflict with the Constitution of the State of New York. It does claim that it has been deprived of its right to a trial by jury," and later calls attention to Section 425, Civil Practice Act, which provides in substance that an issue of fact in an action in which the complaint demands judgment for a sum of money, must be tried by a jury, and asserts that by the judgment at bar it has been deprived of such rights. We are of the opinion that defendant misconceives the purpose and scope of Rule 113. We must accredit to the judges and members of the Bar, constituting the convention at which the Rule was formulated and adopted, a familiarity with the right of a party to a trial by jury and the construction given by the Courts to the provision of the Constitution preserving such right. The argument that Rule 113 infringes upon the right of a trial by jury guaranteed by the Constitution cannot be sustained. The rule in question is simply one regulating and prescribing procedure, whether the Court may summarily determine whether or not a *bona fide* issue exists between the parties to the action. A determination by the Court that such issue is presented requires the denial of an application for summary judgment and trial of the issue by jury at the election of either party. On the other hand, if the pleadings and affidavits of the defendant disclose that no defense exists to the cause of action, and a defendant, as in the instant case, fails to controvert such evidence and establish by affidavit or proof that it has a real defense and should be permitted to defend, the Court may determine that no issue triable by jury exists between the parties and grant a summary judgment.
>
> In the instant case we conclude that the constitutional rights of the defendant are not infringed by the Rule, and that the justice at Special Term properly held that no issue for submission to a jury was shown to exist between the parties.

As Mr. Justice Hogan said in the case just cited, a defendant may in all cases successfully oppose the application for summary judgment by satisfying the Court, if he can show facts as may entitle him to defend. If there be real issues a motion for summary judgment will not lie, provided at least the defendant prepares and submits his affidavit or other proof in opposition to the motion. It appears necessary that the defendant duly submit his "affidavit or other proof" to controvert the affidavit filed by the plaintiff. In Hanna v. Mitchell, 202 App. Div. 504, Mr. Justice Page said at page 515:

> Defendants presented no affidavit or other proof to controvert the proof presented by the plaintiff, but rest upon the denials in their answer and their alleged constitutional rights. The plaintiff proved his cause of action. The defendants offered nothing in answer. Under such circumstances the plaintiff was entitled to judgment.

The Courts, nevertheless, have been jealous in guarding the right of a defendant to present his defense, if there be one. In Peninsular Transportation Co. v. Greater Britain Insurance Corporation, 200 App. Div. 695, in an action on an insurance policy covering the loss of a schooner, claimed to have been struck by a German submarine mine, when answering affidavits were filed denying the existence of such mine in the vicinity of the schooner, and denying the claimed market value of the schooner, etc., the Court held that Rule 113 did not apply. Mr. Justice Laughlin said (page 700):

> It is quite obvious that the Court was not authorized to strike out the answer. There were issues duly joined with respect to the subject and amount of the insurance, and the cause and extent of the loss. Such issues cannot be determined summarily on conflicting affidavits unless the parties waive their right to have them determined on common-law evidence on the trial. The complaint was on a policy of insurance to the owner of the hull. The judgment entered was for less than one-fifth of the amount demanded, and not for the loss of the hull but for loss of anticipated profits of the voyage consisting of the freight charges, which it now appears had been received by plaintiff in advance, with no recourse against it therefor predicated on the loss of the cargo at sea. The fact that the insurance was for a loss that could not be sustained, and that there was insurance on the hull and for more than five times the value thereof, and the other facts and circumstances rendered it quite improper for the Court to pass upon the merits of the defense on affidavits, and plainly entitled the defendant to try the issues with respect to the subject of the insurance, amount of loss, if any, sustained by the plaintiff, and whether it resulted from a cause covered by the policy.

Thus, if the claim is not for a sum certain that can be determined by affidavit, and if real issues be raised, application to the rule is not of avail to the plaintiff.

In Ritz Carleton Hotel v. Ditmars, 203 App. Div. 757, it was held that an affidavit averring that whatever claim the plaintiff may have for accommodations furnished to the defendant, which formed the basis of an action on a note, the indebtedness was not that of the defendant but of his principal, was sufficient to raise a real issue.

The rule does not apply to action in equity asking for an injunction therein. In 103 Park Avenue Company v. Exchange Buffet Corporation, 203 App. Div. 739, the Court specifically stated that the rule does not apply to an action seeking to enjoin payment of certain monies. It could well be argued, however, that the rule would apply in an action, equitable in its nature, to recover a debt or liquidated demand arising on a contract or on a judgment for a stated sum.

In making a motion for summary judgment care must be exercised by the plaintiff to set forth

such facts as will sustain his complaint. If the affidavit of the plaintiff fails to set forth such facts as would sustain his complaint, he cannot complain of a refusal of the Court to enter a judgment on a showing that there might be a liability of defendant to the plaintiff on facts other than those alleged.

Mr. Justice Page has carefully considered this in Hallgarten v. Wolkenstein, 204 App. Div. 487. At page 490 the Court said, in reversing summary judgment granted under the rule:

> Rule 113 of the Rules of Civil Practice explicity provides: "The answer may be struck out and judgment entered thereon on motion, and the affidavit of the plaintiff or of any other person having knowledge of the facts, *verifying the cause of action.*" Which means that the facts stated in the affidavit of the plaintiff or other person having knowledge of them who would be competent to testify to the facts upon the trial, must prove the cause of action stated in the complaint to be true. (Query: Would the "other person" have to be a competent witness to testify in order to sustain the motion?) It is not enough to show that there might be a liability of the defendant to the plaintiff on other facts different from those alleged. We must bear in mind that the rule permits a summary and drastic remedy which can only be invoked by those who demonstrate that they are clearly entitled to the relief. In this case the plaintiff has alleged that on a certain day plaintiff and defendant entered into an agreement in writing, wherein and whereby the plaintiff agreed to sell and the defendant agreed to purchase from plaintiff certain stock at a definite price. This the defendant denies. In verification of this cause of action the plaintiff presents an agreement for the defendant to purchase, but no agreement on the plaintiff's part to sell. He not alone failed to prove the allegations of the complaint, but has demonstrated the truth of the denial in the answer.
>
> It is doubtful whether the plaintiff has set forth facts sufficient to show that he could recover for the price and if a valid agreement to sell had been shown, whether his action should not have been for damages for non-acceptance. With the view that we take of the failure of the plaintiff to prove the written contract alleged in the complaint it is unnecessary to consider this question.

Care must also be used in motions to make certain that the cause of action is "to recover a debt or liquidated demand arising on a contract express or implied, sealed or not sealed."

In Norwich Pharmacal Co. v. Barrett, 205 App. Div. 749, the Court specifically limited the application of the rule to the words "debt or liquidated demand" whether in tort or contract, even though the measure of damages be named at a definite figure. In this Norwich case the action was brought against the defendant as President of the Adams Express Company for the value of goods delivered for transportation, and which the complaint alleged were either lost or damaged in transit through the negligence, carelessness, inattention or omission of the said Express Company. The Court having held that this was "essentially an action to recover for unliquidated damages arising out of neglect to safely carry with reasonable diligence and for the neglect so to do the carrier is liable only for the real damages sustained," limited the rule to an undeniably liquidated demand.

An action on an insurance policy has been held to be for a debt or liquidated damage. In Brooklyn Clothing Corporation v. People's Fire Insurance Company, 118 Misc. 674, Judge Fawcett said:

> The minor contention of the defendant that Rule 113 does not apply because the claim is not on a debt or liquidated damage, is unsound. After loss has occurred under a policy the liability theretofore conditional becomes an absolute one; that is to say, a debt.

This Brooklyn Clothing case may be somewhat at variance with Peninsular Transportation Company v. Greater Britain Insurance Company, *supra*, but if the liability has, as the learned Justice said, become an absolute one, there is no reason why the provisions of the rule should not apply.

The rule has been applied in favor of a duly elected public officer against a usurper to recover the amount of salary paid to the usurper prior to his removal from office. (Lee v. Graubard, 205 App. Div. 344.)

In that action the plaintiff, the Socialist candidate for the position of Alderman of the City of New York, was elected, but the defendant, a Republican, was certified for the office upon the first statement of the canvass of the election. After proper hearing the plaintiff was declared the rightly elected incumbent of the office. The plaintiff brought an action against the Republican for the salary paid prior to the ultimate decision of the election. The Court held that Rule 113 applied and that the damages were liquidated, there being no question as to the amount of salary and the time during which it was paid to the defendant when it should have been paid to the plaintiff.

It is obvious that this Rule serves a long felt want. Certainly no one can say that the defendant has a right to have a jury called, empanelled and sworn to try the isues when no issues can be raised. If the only result of the allowing the purported issues to go to trial be that the Court direct the jury to find the issues for the plaintiff, the defendant cannot complain that the plaintiff be spared the agony of the long wait and the expense of the trial before the entry of judgment.

Judicial Public Spirit

"That the charge frequently levelled against lawyers of being in the last degree mercenary is not well founded, is very clearly illustrated by the late Lord Loreburn's act of renunciation a few years ago. As an ex-Lord Chancellor he was entitled to draw the statutory pension of five thousand pounds, but in view of the economic stress to which the country was subjected during the years of the War he relinquished half of that amount. His colleague and one of his successors on the Woolsack, Viscount Finlay, showed the same public spirit by the stipulation on his acceptance of the Chancellorship that he should receive no pension at all on his retirement. So, too, did Lord Strathclyde, the ex-Lord President of the Court of Session, who, on his retirement from that high office in 1920, was entitled to a pension of three thousand seven hundred and fifty pounds. This he relinquished in 1922, giving as his reason for taking this step that the state of his health precluded him from taking any part in the judicial work of the House of Lords—a recognition of the fact that although not legally bound to serve the country in the highest appellate tribunal, he, like most of the other judges who have been raised to the peerage, regarded it as a kind of moral obligation to give a return for the pension to which he was entitled. The man in the street who is occasionally heard to cavil at the amount of judicial pensions does not realize, first, the pecuniary sacrifice most men have to make in accepting a seat on the Bench, and, secondly, the almost continuous service they give in various spheres, in addition to judicial work in the House of Lords and Judicial Committee of the Privy Council, as a return for the pensions they draw. Judicial pensions are certainly well earned."—*The Law Times*, Dec. 8, '23.

REVIEW OF RECENT SUPREME COURT DECISIONS

Anti-Alien Land Law of Washington Not in Conflict with Constitution or Treaty—California Statute Escheating Twenty-Year Old Unclaimed Bank Accounts Upheld—Safety Appliance Act and Employe's Rights—Director General Liable for False Imprisonment—Appeals in Habeas Corpus Proceedings

By Edgar Bronson Tolman

Aliens

The Anti-Alien Land Law of Washington is not in conflict with the National or State Constitution or the treaty with Japan.

Terrace v. Thompson, et al., Adv. Ops. 35, Sup. Ct. Rep. 15.

This was a suit brought to test the constitutionality of the Anti-Alien Land Law enacted by the legislature of the State of Washington in 1921. That statute prohibited the ownership of land by aliens other than those who in good faith had declared their intention to become citizens of the United States. To "own" was defined as to "have the legal or equitable title to or the right to any benefit of" the land.

Suit was brought by two American citizens and a Japanese subject to restrain the State Attorney General from enforcing the act. It was alleged that the owners were about to lease farm land to the Japanese, who was a desirable agricultural tenant, and that they were prevented from so doing by threats of the Attorney General to enforce the statute in question by criminal prosecution of complainants and by declaring the leaseholds forfeited to the State. The act, it was contended, violated the due process and equal protection clauses of the Federal Constitution, the State constitution, and the treaty between the United States and Japan. The District Court for the Western District of Washington granted the motion of the Attorney General to dismiss the complaint as not stating facts entitling complainants to relief, and the decree for defendant accordingly entered was affirmed on appeal to the Supreme Court.

Mr. Justice Butler delivered the opinion of the Court. He first considered the jurisdictional objection raised by the Attorney General that complainants had a plain, adequate and speedy remedy at law, inasmuch as the validity of the statute could be tested in the proceedings to declare the leasehold forfeited. After assenting to the general principle, the learned Justice said:

> But the legal remedy must be as complete, practical and efficient as that which equity could afford (citing cases). Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person, who as an officer of the State is clothed with the duty of enforcing its laws and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a Federal court of equity.

On this point he said further:

> And assuming, as suggested by the Attorney General, that after the making of the lease the validity of the law might be determined in proceedings to declare a forfeiture of the property to the State or in criminal proceedings to punish the owners, it does not follow that they may not appeal to equity for relief. No action at law can be initiated against them until after the consummation of the proposed lease. The threatened enforcement of the law deters them. . . The owners. . . are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights. The complaint presents a case in which equitable relief may be had, if the law complained of is shown to be in contravention of the Federal Constitution.

Coming to the merits, the learned Justice in the following words reached the conclusion that the act was not repugnant to the due process clause:

> The Fourteenth Amendment, as against the arbitrary and capricious or unjustly discriminatory action of the State, protects the owners in their right to lease and dispose of their land for lawful purposes and the alien resident in his right to earn a living by following ordinary occupation of the community, but it does not take away from the State those powers of police that were reserved at the time of the adoption of the Constitution (citing cases). And in the exercise of such powers the State has wide discretion in determining its own public policy and what measures are necessary for its own protection and properly to promote the safety, peace and good order of its people.
>
> And, while Congress has exclusive jurisdiction over immigration, naturalization and the disposal of the public domain, each State, in the absence of any treaty provision to the contrary, has power to deny to aliens the right to own land within its borders. . .
>
> State legislation applying alike and equally to all aliens, withholding from them the right to own land, cannot be said to be capricious or to amount to an arbitrary deprivation of liberty or property, or to transgress the due process clause.

With regard to the equal protection clause, he said:

> That clause secures equal protection to all in the enjoyment of their rights under like circumstances (citing cases). But this does not forbid every distinction in the law of a State between citizens and aliens resident therein.

The classification between citizens and alien declarants on the one hand, and alien nondeclarants on the other, the learned Justice regarded as reasonable and pertinent. He recalled how this division had been made in State and Federal legislation having to do with suffrage, and with liability to military service. Further, the rule of eligibility adopted by Congress furnished the State with a reasonable basis for classification. And the inclusion of nondeclarants with ineligibles was reasonable; only those who could and would become citizens were to be allowed to hold land. Distinguishing the case of Truax V. Raich 239 U. S. 33, where an Arizona statute making it illegal for a large employer to employ less than eighty per cent of qualified electors or native born citizens of the United States, was held unconstitutional, he said:

> In the case before us, the thing forbidden is very different. It is not an opportunity to earn a living in common occupations of the community, but it is the privilege of owning or controlling agricultural land within the State. The quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the State itself.

It had been alleged that the Japanese complainant was engaged in trading in farm products, in order to

bring him within the protection of the treaty. But the learned Justice said:

> We think that the treaty not only contains no provision giving Japanese the right to own or lease land for agricultural purposes, but, when viewed in the light of the negotiations leading up to its consummation, the language shows that the high contracting parties respectively intended to withhold a treaty grant of that right to the citizens or subjects of either in the territories of the other. The right to "carry on trade" or "to own or lease and occupy houses, manufactories, warehouses and shops," or "to lease land for residential and commercial purposes," or "to do anything incident to or necessary for trade" cannot be said to include the right to own or lease or to have any title to or interest in land for agricultural purposes. The enumeration of rights to own or lease for other specified purposes impliedly negatives the right to own or lease land for these purposes. A careful reading of the treaty suffices in our opinion to negative the claim asserted by appellants that it conflicts with the state act.

This conclusion was supported by a consideration of the history of the draft of the treaty.

Finally it was held that a recent decision of the Supreme Court of Washington holding that the act did not contravene the State constitution precluded the present Court from considering the contention:

> The question whether or not a state statute conflicts with the constitution of the state is settled by the decision of its highest court (citing case). This court "is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the State."

In *Porterfield et al. v. Webb et al.*, Adv. Ops. 42, Sup. Ct. Rep. 21, decided the same day, the Court, again by Mr. Justice Butler, held that the California Alien Land Law of 1920 was constitutional on the authority of the *Terrace* case, *supra*. The California act empowered ineligible aliens to hold land only to the extent authorized by treaty, and applying the construction placed on the treaty with Japan in the first case, the Court affirmed an order of a District Court which had held that a Japanese under this statute could not rent land for agricultural purposes.

The classification in the California act was somewhat different in that the prohibited class included ineligible aliens only. The failure of the legislature to include eligible alien declarants was held to be not unreasonable.

A week later Mr. Justice Butler delivered two opinions of the Court involving other aspects of the California act. Like the *Porterfield* case, these were suits brought to enjoin the Attorney General from enforcing the act and from thus preventing complainants from doing what they would do unless so deterred. In *Webb et al., v. O'Brien et al.*, Adv. Ops. 109, Sup. Ct. Rep. 112, the citizen complainant was about to enter into a cropping contract with a Japanese farmer. By this contract the Japanese was to be allowed to live upon and work the land. He was to receive one-half of the crops as his sole compensation. But the contract expressly declared that the cropper should have no interest or estate in the land. Nevertheless it was held that the contract would confer a right not authorized by the treaty, and the order granting a preliminary injunction was reversed. The learned Justice said in part:

> Assuming that the proposed arrangement does not amount to a leasing or to a transfer of an interest in real property, and that it includes the elements of a contract of employment. . ., we are of opinion that it is more than a contract of employment; and that, if executed, it will give to Inouye a right to use and to have or share in the benefit of the land for agricultural purposes.
>
> The treaty gives no permission to enjoy, use, or have the benefit of land for agricultural purposes. The privileges granted by the act are carefully limited to those prescribed in the treaty. The act, as a whole, evidences legislative intention that ineligible aliens shall not be permitted to have or enjoy any privilege in respect of the use or the benefit of land for agricultural purposes. . . . As applied to this case, the act may be read thus: "Ineligible aliens may own or lease houses, manufactories, warehouses, and shops, and may lease land for residential and commercial purposes. These things, but no possession or enjoyment of land otherwise, are permitted."

The case of *Frick et al. v. Webb et al.*, Adv. Ops. 112, Sup. Ct. Rep. 115, was similar. But here a United States citizen was about to sell to a Japanese 28 shares of the capital stock of an agricultural land corporation. And here a different section of the California statute was involved, one which authorized ineligible aliens to acquire stock in such companies only "in the manner and to the extent and for the purposes prescribed by any treaty." The order denying the injunction was affirmed. The State, said the learned Justice:

> may forbid indirect as well as direct ownership and control of agricultural land by ineligible aliens. The right "to carry on trade" given by the treaty does not give the privilege to acquire the stock above described. To read the treaty to permit ineligible aliens to acquire such stock would be inconsistent with the intention and purpose of the parties. We hold that the provision of Section 3, above referred to, does not conflict with the Fourteenth Amendment or with the treaty.

Mr. Justice McReynolds and Mr. Justice Brandeis expressed the opinion that all four cases should be dismissed on the ground no justiciable controversy was involved.

The *Terrace* case was argued by Mr. James B. Howe for complainants and by Mr. Lindsay L. Thompson, Attorney General of Washington, for the State authorities.

The other three cases, involving the California statute, were argued by Mr. Louis Marshall for complainants, and by Mr. U. S. Webb, Attorney General of California, for the State authorities.

Escheat—Banks

The California statute escheating to the State bank accounts unclaimed for twenty years does not deny due process or violate the contract clause.

Security Savings Bank v. State of California, Adv. Ops. 119, Sup. Ct. Rep. 108.

California statutes provide for legal proceedings to compel banks to turn over to the State treasurer deposits that have not been added to or drawn upon for twenty years, provided no claimant has within that time filed with the bank any notice showing his present residence, and provided the president or managing officer of the bank does not know that the depositor is alive. The suit is to be brought by the Attorney General in Sacramento County. Personal service is required on the bank. Jurisdiction is to be obtained of the depositor by four publications of the summons in a newspaper in Sacramento County. Publication is also required of a notice calling on all persons to appear and show cause why the deposit should not be turned over to the State Treasurer. Upon entry of the judgment the State takes over the deposit, but for five years thereafter any person not party or privy to the suit may sue to recover the money.

This statute was held invalid as to national banks in *First National Bank v. California* 262 U. S. 366, 67 L. ed.—, 43 Sup. Ct. Rep. 602, reviewed in the August number of the Journal. The present decision establishes the constitutionality of the law as to other banks. The State of California brought suit in the

manner specified to recover such an unclaimed deposit. Judgment for plaintiff was affirmed by the Supreme Court of California, and, on writ of error, again by the Supreme Court of the United States.

Mr. Justice Brandeis delivered the opinion of the Court. The unclaimed deposits, he said, were intangible property within the State. Thus, he continued:

> Over this intangible property the State has the same dominion that it has over tangible property (citing case. . . . where the procedure is appropriate neither the due process clause nor any right of the bank under the contract clause is violated by a law requiring it to pay over to the State, as depositary, savings deposits which have long remained unclaimed (citing cases). The contract of deposit does not give the banks a tontine right to retain the money in the event that it is not called for by the depositor. It gives the bank merely the right to use the depositor's money until called for by him or some other person duly authorized. If the deposit is turned over to the State, in obedience to a valid law, the obligation of the bank to the depositor is discharged.

The principal contention and the Court's answer were stated as follows:

> The bank's main contention is that it is denied due process because, owing to defects in the prescribed procedure, depositors will not be bound by the judgment; and hence, that payment to the State will not discharge the bank from its liability to them. The argument that there is no proper provision for service upon depositors or other claimants is this: If the proceeding is *in personam*, the law is invalid as to nonresidents of the State, since they are served only by publication; and it is invalid as to residents, because they are served by publication without a prior showing of the necessity for such service. If the proceeding is *quasi in rem*, the law is invalid as to all depositors and claimants, because there is no seizure of the *res*, or its equivalent; because the notice provided for is inadequate and unreasonable; and because it is binding only on parties to the action. If the proceeding is strictly *in rem*, the law is invalid, because it does not provide for such seizure of the *res*, nor give reasonable notice to depositors and claimants.
>
> The proceeding is not one *in personam*—at least not so far as concerns the depositor. The State does not seek to enforce any claim against him. It seeks to have the deposit transferred. The suit determines the custody (and perhaps the ownership) of the deposit. The State court likened the proceeding to garnishment, and thought it should be described as *quasi in rem*. In form it resembles garnishment.

After comparing the substance of the proceedings to those in escheat, confiscation, forfeiture, condemnation and registry of titles, he continued:

> But whether the proceedings should be described as being *in rem* or as being *quasi in rem* is not of legal significance in this connection. In either case the essentials of jurisdiction over the deposits are that there be seizure of the *res* at the commencement of the suit; and reasonable notice and opportunity to be heard (citing cases). These requirements are satisfied by the procedure prescribed in the statutes of California. There is a seizure or its equivalent. And the published summons to the depositors named as parties defendant is supplemented by the notice directed to all claimants whomsoever. Moreover, there is no constitutional objection to considering the proceeding as *in personam*, so far as concerns the bank; as *quasi in rem*, so far as concerns the depositors; and as strictly *in rem*, so far as concerns other claimants.

Service upon the bank, declared the learned Justice, constituted a taking possession of the *res*.

To the contention that constructive service could not be employed unless it was shown that personal service was impossible or impractical, he replied:

> Here the general facts which underlie the legislation established the futility of such a requirement. It may be that in California banks usually endeavor to ascertain the whereabouts of depositors whose accounts have remained dormant for many years. The statute applies only to deposits in the name of a person who is not known to the president or managing officer of the bank to be alive, whose account has not been added to or drawn upon for twenty years, and who has not filed within that time any notice or claim giving his then residence. The legislature evidently assumed that it would be impossible to serve such depositors personally. The Supreme Court of the State held that the legislature was warranted in this assumption. The owners of the deposits were, therefore, treated like persons unknown.

Likewise he held that requiring publication in Sacramento County was not unreasonable. He said in part:

> The legislature apparently assumed that publication in Sacramento county would be more likely to attract the attention of the depositor, or of those claiming under him, than publication in the city in which the bank was located. . . . The fact that, after nine or more such publications in the local newspaper, a deposit remains unclaimed, affords the legislature some basis for thinking that the further publication provided for in these proceedings would be more apt to accomplish the purpose of actual service if made in the county in which the State capitol is located.

The case was argued by Messrs. Edward J. McCutchen, Warren Olney, Jr., and A. Crawford Greene for the bank, and by Mr. U. S. Webb, Attorney General of California, for the State.

Statutes.—Safety Appliance Act

An employee may recover for injuries of which the failure of the railroad to comply with the Safety Appliance Act is the proximate cause, although not engaged in an operation in which the safety appliance is specifically designed to protect him.

Davis v. Wolfe, Adv. Ops. 28, Sup. Ct. Rep. 64.

Suit was brought by a conductor of a freight train engaged in interstate commerce and under federal control to recover damages for personal injuries. Plaintiff based his right to recover upon an alleged violation of the Federal Safety Appliance Act which forbids such railroads to use cars "not provided with secure grab irons and handholes in the ends and sides . . . for greater security to men in coupling and uncoupling cars." The contention of the railroad was that there was no breach of duty towards plaintiff by reason of the Act, because the conductor was not engaged in coupling or uncoupling cars, but was standing on a sill-step signalling the fireman, and was thrown off by reason of the admittedly defective grab iron to which he was holding. But judgment was entered against defendant, and was affirmed by the Supreme Court of Missouri, and, on writ of certiorari, again by the Supreme Court of the United States.

Mr. Justice Sanford delivered the opinion of the Court. He found an analogy to the present situation, in those cases involving another section of the act requiring automatic couplers for the benefit of employees passing between the ends of cars, but where the injured employee was not engaged in coupling or uncoupling. After a consideration of these cases, he said:

> The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; and, on the other hand, he can recover if the failure to comply with the requirements of the Act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection. . .
>
> It results that in the instant case, as there was substantial evidence tending to show that the defective condition of the grab iron required by Section 4 of the Safety Appliance Act was a proximate cause of the accident reresulting in injury to Wolfe while in the discharge of his duty as a conductor, the case was properly submitted to

the jury under the Act; and the issues having been determined by the jury in his favor the judgment of the trial court was in that behalf properly affirmed.

The case was argued by Mr. Frank H. Sullivan for the railroad and by Messrs. Sidney Thorne Able and P. H. Cullen for the employee.

Federal Control Act

The Director General of Railroads is liable for false imprisonment.

Director General of Railroads v. Kastenbaum, Adv. Ops. 84, Sup. Ct. Rep. 52.

Certain merchandise having been stolen from a railroad under Federal control, it was discovered in a wagon wrecked by a street car. Detectives employed by the railway company suspected Kastenbaum of being the owner of the wagon, and accordingly had him arrested. Kastenbaum spent a night in the police station before he was released on bail. After his innocence had been made clear and the magistrate had discharged him, Kastenbaum brought an action for false imprisonment against the Director General of Railroads in the Supreme Court of Erie County, New York. He obtained a verdict and judgment, which was affirmed by the appellate courts of New York, and, on certiorari, again by the Supreme Court of the United States.

The CHIEF JUSTICE delivered the opinion of the Court. After reviewing the facts, and quoting Section 10 of the Federal Control Act which makes carriers under Federal control liable to suit as common carriers, he pointed out that it was not enough to say that it must be conclusively presumed that good faith existed upon the part of the sovereign government because good faith is not enough to constitute probable cause. He then said:

> The Government under Section 10, in a case of false imprisonment, stands exactly as if it were a railway corporation operating as a common carrier. Such a corporation would clearly be responsible for an arrest of the kind here shown if without probable cause and made by one of its detectives employed to protect the property entrusted to its care as a common carrier. It is within the scope of the agency of such an employee to discover the perpetrators of crime against the property in order to recover it and to procure the arrest of supposed offenders and their prosecution and conviction in order to deter others from further depredations. If in the field of such employment, the agent acts without probable cause and an illegal arrest without judicial warrant is made, the corporation is liable as for any other act of its agents within the scope of their employment in carrying on the business of a common carrier.

The case was argued by Messrs, Thomas R. Wheeler and Lyman M. Bass for the Director General and by Mr. Israel G. Holender for Kastenbaum.

Practice.—Appeals, Habeas Corpus

An appeal lies to the Circuit Court of Appeals from a final order of a District Judge in chambers discharging petitioner in a habeas corpus proceeding.

Craig v. Hecht, Adv. Ops. 124, Sup. Ct. Rep. 103.

The Craig case, in which the newspapers and weeklies of opinion have found a talking point for a discussion of free speech, involved in the Supreme Court only a ruling upon a point of procedure. When Craig, in October, 1919, wrote a letter to District Judge Mayer assailing certain actions of the judge in connection with a receivership matter then pending before him, a charge of criminal contempt was brought against Craig. Fifteen months after the letter was written, Judge Mayer sentenced Craig to jail for sixty days. From this order Craig did not appeal, but instead presented a petition for a writ of habeas corpus to Judge Manton, a Circuit Judge who had been assigned to the District Court. Judge Manton concluded that Craig's act did not amount to an obstruction of the administration of justice, and ordered that petitioner be discharged. From Judge Manton's order an appeal was allowed to the Circuit Court of Appeals for the Second Circuit. That Court held that a habeas corpus proceeding could not be used as a writ of error, but that it involved only a consideration of the question whether the court sentencing for contempt had jurisdiction of the offense and of the petitioner. It concluded that Judge Mayer's court had such jurisdiction and accordingly reversed Judge Manton's order of discharge. Craig, contending that no appeal lay from Judge Manton's order, then brought the case to the Supreme Court by writ of certiorari. There the decree of the Circuit Court of Appeals was affirmed.

Mr. Justice McReynolds delivered the opinion of the Court. He first held that Circuit Court Judges, as such, had no power to issue writs of habeas corpus. But Judge Manton had been assigned to the District Court, and was exercising the powers of the District Court. The learned Justice continued:

> If it be conceded that he acted as District Judge, and not as the District Court, nevertheless his action was subject to review.

An examination of the statutes and the cases led him to the conclusion that the act abolishing Circuit Courts and establishing Circuit Courts of Appeals did not do away with the right of appeal in habeas corpus proceedings. He said:

> The fact that the right of appeal was not thus abolished furnishes a persuasive inference that Congress intended to designate a court to hear and determine such appeals . . . It was the purpose of the Act of March 3, 1891, to distribute the entire appellate jurisdiction theretofore exercised by the Federal courts between the Supreme Court of the United States and the Circuit Courts of Appeals that were thereby established. This intent, we think, is plainly apparent from the terms of the act. Moreover, the act in question very much enlarged the right of appeal, and that was one of its chief objects. In no single instance, so far as we are aware, was a previous right of appeal abolished.
>
> We think, therefore, that it may be fairly concluded that it was the intention of Congress to confer on the Circuit Courts of Appeals the right to hear appeals from final orders made by District judges in habeas corpus cases, as well as to hear appeals from final decisions of District Courts made in such cases.

He said further:

> The matter heard by Judge Mayer was an ordinary contempt proceeding . . . the District Court had power to entertain it, decide whether the evidence established an offense within the statute, and determine petitioner's guilt or innocence. When the latter found himself aggrieved by the decree his remedy by appeal was plain. Neglecting that course, he asked a single judge to review and upset the entire proceedings, and now claims there was no appeal from the favorable order. As tersely stated by Judge Hough: "There is no new matter in this record attacking jurisdiction; what really happened was that the case was tried over again, and the so-called writ was no more than a device for obtaining a new trial." The course taken indicates studied purpose to escape review of either proceeding by an appellate court. Petitioner may not complain of unfortunate consequences to himself."

The CHIEF JUSTICE delivered a concurring opinion in the course of which he said:

> The Federal statute concerning contempts, as construed by this Court in prior cases, vests in the trial judge the jurisdiction to decide whether a publication is obstructive or defamatory only. The delicacy there is in the judge's deciding whether an attack upon his own judicial

action is mere criticism or real obstruction, and the possibility that impulse may incline his view to personal vindication, are manifest. But the law gives the person convicted of contempt in such a case the right to have the whole question on facts and law reviewed by three judges of the Circuit Court of Appeals who have had no part in the proceedings, and, if not successful in that court, to apply to this Court for an opportunity for a similar review here.

The petitioner and his counsel have made such a review impossible. Instead of pursuing this plain remedy for injustice that may have been done by the trial judge, and securing by an appellate court a review of this very serious question on the merits, they sought, by applying to a single judge of only co-ordinate authority, for a writ of habeas corpus, to release the prisoner on the ground that the trial judge was without jurisdiction to make the decision he did. This raised the sole issue whether the trial judge had authority to decide the question—not whether he had rightly decided it.

Mr. Justice Holmes, with whom concurred Mr. Justice Brandeis, dissented. He was of the opinion that the words of the statute giving courts "power . . . to punish . . . contempts of their authority" should be read literally, that this "power" referred to jurisdiction, and that the question of the extent of this jurisdiction could be reviewed, and could only be reviewed, by habeas corpus proceedings. He said in part:

It seems to me that the statute on its face plainly limits the jurisdiction of the judge in this class of cases to those where his personal action is necessary in a strict sense in order to enable him to go on with his work. But wherever the line may be drawn, it is a jurisdictional line. . .

I think that the sentence from which the petitioner seeks relief was more than an abuse of power. I think it should be held wholly void. I think in the first place that there was no matter pending before the court in the sense that it must be to make this kind of contempt possible. It is not enough that somebody may hereafter move to have something done. There was nothing then awaiting decision when the petitioner's letter was published. . . Unless a judge, while sitting, can lay hold of anyone who ventures to publish anything that tends to make him unpopular or to belittle him, I cannot see what power Judge Mayer had to touch Mr. Craig. . . A man cannot be summarily laid by the heels because his words may make public feeling more unfavorable in case the judge should be asked to act at some later date, any more than he can for exciting public feeling against a judge for what he has already done.

The case was argued by Mr. Edmund L. Mooney for Craig, and by Solicitor General Beck for the Federal authorities.

JUDICIAL POWER TO DECLARE LEGISLATION UNCONSTITUTIONAL

By EVERETT P. WHEELER
Chairman Committee on Jurisprudence and Law Reform

AT the last session of the American Bar Association it adopted unanimously the following resolution:

This Association records its opposition to any proposal to limit the power of the Supreme Court of the United States to sustain and enforce the Constitution as the supreme law of the land, as against any Act of Congress in conflict therewith.

Whatever Mr. Justice Clarke says on this subject is entitled to respectful consideration. But it is difficult either for the lay mind or for the legal mind to see any substantial difference between a limitation upon the power of the Supreme Court imposed by the legislature and a limitation upon that power imposed by the court itself. In either case the result is the same. It may be said that the limitation imposed by the court itself would be more graceful, but in a matter of this importance grace is not the first consideration. Is there, then, any substantial reason why a minority of the court should be entrusted with the power to overrule the majority? It is easy for anyone to say that a decision rendered by five judges is rendered by one man, but, on consideration, the contrary is plain. It is really rendered by the unanimous opinion of the five. If there be four who dissent, they still are but four and in the minority. Under the American system the will of the majority expressed according to law, and especially when it is expressed in conformity with the Constitution, must control.

Mr. Justice Clarke argues that "men not steeped in legalistic thinking and forms of expression" cannot understand how five judges can agree that an act is "beyond rational doubt in violation of the Constitution" when four judges hold that it is enacted in pursuance of power given by the Constitution and that the case "seems absolutely free from doubt." But it is a poor rule that won't work both ways. So I ask Mr. Justice Clarke how is it possible that four judges can say that the validity of an act is "absolutely free from doubt" when five have come to the conclusion, after hearing argument and after careful consideration, that the act is in violation of the Constitution and not within the powers conferred by that instrument upon the legislature.

The truth is that the clamor against "five to four decisions" is simply one of those catch words which are caught up from time to time and are attractive until their error is made clear. It seems to me,—and I speak not only as chairman of the Committee of the American Bar Association on Jurisprudence and Law Reform but as the result of fifty years' experience as an advocate in the Supreme Court,—that to give to a minority of the court the power to overrule the majority would be opposed to every American principle of government and to the dictate of good sense. A careful study of the history of the court will show that its decisions declaring acts of the legislatures to be "ultra vires," as the English call it, or as we call it, unconstitutional, have been of the greatest benefit to the American Republic and that if these decisions had been the other way, we should not have been a nation at all. A nation whose instrumentalities could be taxed out of existence by a state government, a nation composed of states each of which had the power to tax or prohibit commerce with other states, a nation without power to establish a uniform banking system and subject to the power of each state to regulate immigration into its territory, would not be a nation at all. Yet all these powers of the national government have been established by decisions of the United States Supreme Court

overruling the adverse decisions, sometimes unanimous, of state courts of high authority. To apply Mr. Justice Clarke's question: How can anyone say that after the decision rendered by Chancellor Kent that an act of the legislature of the State of New York taxing and in many cases prohibiting commerce with other states of the union was within the power of the state legislature, the question could be said to be "absolutely free from doubt"? Kent was certainly one of our great jurists, but Chief Justice Marshall and his associates in Gibbons v. Ogden (9 Wheat. 1) had the courage to overrule even this great man and we can see from his Commentaries that he subsequently admitted that the Supreme Court was right and he had been wrong.

One of the most notable "five to four decisions" is not referred to by Mr. Justice Clarke,—that rendered by the Supreme Court in the Passenger tax cases. In these cases not only did the Supreme Court overrule the decision of the Court of Errors and Appeals of New York but that of the supreme Judicial Court of Massachusetts (7 Howard 283). The dissenting judges, Chief Justice Taney and Justices Nelson, Daniels and Woodbury, all were able men, but the country has acquiesced in the decision and no one now would think for a moment of changing it. The recent cases in the Supreme Court on this subject are unanimous: Henderson v. the Mayor of New York, 92 U. S. 259,—Inman S. S. Co. v. Tinker, 94 U. S. 238. In the latter case at page 245 Mr. Justice Swayne says, "The confusion and mischiefs that would ensue if this restriction were removed are too obvious to require comment. The lesson on the subject taught by the law before us is an impressive one."

One of the most delightful instances of the complete and final popular approval of a decision of the Supreme Court overruling a decision of the highest court of a state is to be found in the establishment of the national banking system during the civil war and of the federal reserve banking system in 1913. So great a man as Andrew Jackson, the President of the United States, was clearly of the opinion that Congress had no power to establish a national bank. On this ground he vetoed a bill providing for the renewal of the charter of that bank. This he did, although the Supreme Court in McCulloch v. Maryland (4 Wheat. 316) decided that the power to establish such a bank was conferred upon Congress. Experience has shown that the power to establish a national banking system is absolutely essential to the administration of the government. I am of the few who can remember the great inconveniences and loss occasioned to the public before the civil war by the failure on the part of Congress to exercise this power. Whenever I look at a ten-dollar banknote of the Federal Reserve bank and see thereon the portrait of Andrew Jackson, I smile at the sense of humor of the artist. And even Jackson himself, when the claim was made by South Carolina that an act of Congress was unconstitutional, declared explicitly in favor of a resort to the courts and recognized the power of the court to decide the question. In his nullification proclamation, December 10, 1832, he said: "There are two appeals from an unconstitutional act passed by Congress,—one to the judiciary, the other to the people and the states. . . . The Constitution declares that the judicial powers of the United States extend to cases arising under the laws of the United States, and that such laws, the Constitution, and the treaties, shall be paramount to the state constitution and laws. The judiciary act prescribes the mode by which the case may be brought before a court of the United States, by appeal, when a state tribunal shall decide against this provision of the Constitution." (2 Richardson, 640, 642.)

The true principle upon which the court proceeds has been well stated in a recent Kentucky decision, Board of Penit. Commissioners v. Spencer (159 Kentucky 255, 263): "A decision like this would virtually destroy the influence of the Constitution as a controlling guide and restraint upon the conduct of the people and their political agents and leave them free from the limitations that it imposes."

Let me add that this power of the court is exercised not only by the supreme Court of the United States but by the British House of Lords as well. That court declared an act of the Dominion Parliament "ultra vires" and therefore invalid: Attorney General for Canada v. Attorney General for Ontario, etc., Appeal Cases (1898) 701, 714. A similar decision was made by the British Privy Council in Union Colliery Co. v. Bryden, Appeal Cases (1899) 580,587. In Royal Bank of Canada v. Rex, Appeal Cases (1913) 283, 289, the same power is exercised by the courts of the British possessions. Many other instances might be cited. A reference to a recent decision of the High Court of Australia will suffice,—Huddart v. Moorhead, 8 Commonwealth Law Reports, 331. The rule is well stated by Moore, (Constitution of Australian Commonwealth, 2 ed. 357):

> The most distinctive feature of the courts in the federal system is their power to determine whether a statute passed by the Commonwealth or by a State Parliament is within the authority committed to that legislature, a power which gives the courts a peculiar importance in constitutional law and makes them in an especial way the guardians of the Constitution. . . .
>
> Thus, in Germany, and Switzerland, where the law of state or canton conflicts with federal laws or the federal constitution, the courts must treat the state law as pro tanto overridden. . . .
>
> The duty of passing upon the validity of acts whether of the Commonwealth or of the State Parliament exists purely as an incident of judicial power. It belongs not to any one court, or any system of courts, but to all courts within the Commonwealth, whatever their degree, whenever in a matter of litigation before them, some act of the one legislature or the other is invoked.

Inasmuch as Mr. Justice Clarke's article is one of the "New Federalist Series," it cannot be amiss to quote from Article 78 of the first Federalist written by Alexander Hamilton:

> There is no question which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised is void. No legislative act, therefore, contrary to the Constitution can be valid . . where the will of the legislature declared in the statutes, stands in opposition to that of the people declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws. . . Accordingly whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

In resuscitating the old theory that a public official ought to try to save the people from undue taxation, Secretary Mellon has shown an antiquarian zeal equal to that of the excavators of King Tut.

At the banquet of the American Bar Association at St. Paul the Earl of Birkenhead spoke on "The Lawyers Who Really Count." As banquets go nowa-days there are practically no lawyers who can't count right up to the minute the affair adjourns.

ARRANGEMENTS FOR SPECIAL LONDON MEETING

REQUESTS for reservations for the London trip continue to come in, according to members of the Committee on Arrangements and Transportation, who met at Philadelphia at the time of the meeting of the Executive Committee of the American Bar Association. In order to afford the fullest assistance possible at this time to those contemplating the trip the Transportation Committee has compiled a good deal of important travel information, which is printed in this issue. At the Philadelphia meeting it also issued a statement setting forth the facts in connection with the selection of the Berengaria as the ship to carry the delegation to London,—a selection which has called forth in some quarters hasty criticism not at all in accord with the facts of the case. As the statement shows, the committee really had no alternative and only chose the Berengaria after its repeated efforts to get definite assurance as to the necessary date of sailing and as to satisfactory rates from the United States Lines had proved wholly unavailing.

Statement by Committee

The Committee on Arrangements and Transportation charged with making the arrangements for the trip to London of the American Bar Association submits the following statement of facts:

The American Bar Association at its meeting in Minneapolis in September, 1923, accepted the invitation extended to it by the British Bar and the Law Society of England to meet with the Bar and the Law Society and the Canadian Bar in London during July, 1924. At the same time the Association determined that it would not depart from its established custom of holding its regular Annual Meeting in America and further that this meeting should be held prior to the departure for England of those members who were to make the trip to London. In the invitation the British Bar expressed a desire that the meeting should be held as near as possible to the week beginning Sunday, July 20th for the reason that the courts of England close for their "Long Vacation" at the end of July and our British brethren were anxious that our meeting in London should be at a time when we could attend their courts and see them in operation. Because of the attendance at the two great National Conventions of many of our members and because of the desire of all of the members to be at their homes if possible on July Fourth, it was regarded as impossible to arrange to hold a meeting earlier than Tuesday, July 8th. This left only the time between July 8th and July 20th for the holding of the regular Annual Meeting and for the trip to London. The regular Annual Meeting has for years been held on Wednesday, Thursday and Friday, in order to allow the days earlier in the week for the meetings of certain sections and committees.

Considering all of these facts the Committee was forced to the conclusion that it would be necessary to sail on Saturday, July 12th, in order to allow the necessary time for the Annual Meeting before sailing and the time necessary for the passage before the meeting in London. In other words, the National Conventions and Independence Day fixed the earliest limit and the date suggested by our British brethren fixed the latest limit, and the problem reduced itself to securing a sailing date of a large enough boat to accommodate the party, and making arrangements with that boat to sail on or about Saturday, July 12th.

The Committee knew that the three principal steamship lines each had a vessel of this size.

Negotiations were carried on with these three companies: The United States Lines having the steamship "Leviathan," the International Mercantile Marine having the steamship "Majestic," and the Cunard Steamship Company having the steamship "Berengaria." The natural inclination of the Committee was to sail, if possible, on an American ship. The necessities as to date of sailing were made plain to each of the companies and a request made for a sailing date as close as possible to Saturday, July 12th. The Company operating the "Majestic" did not evidence any great desire to have us use that ship.

We were not able to get from the United States Lines, operating the "Leviathan," any definite assurance as to sailing date, beyond the expression of a belief by the agents that her sailing date when fixed would be Saturday, July 5th. Negotiations were carried on with agents of these lines in different cities. None of them seemed able to get for us or give us the necessary assurance as to a sailing date although we impressed upon them the necessity of sailing on or about Saturday, July 12th.

The Cunard Steamship Company, operating the "Berengaria," which was scheduled to sail on Tuesday, July 15th, immediately upon being informed of our requirements, agreed to alter several sailing dates of that vessel in order that she might be at our disposal on the day we specified.

The question of rates was, of course, important. The United States Lines quoted a rate of $350 per passenger for the ship, but when informed that in the opinion of the Committee this rate was too high, they then took the position that they would meet the rate offered by their competitors. The Committee did not, of course, inform them what rate had been offered by the Cunard Steamship Company. During the negotiations and after their offer to meet the rate submitted by their competitors they did tentatively suggest that they would determine from their records what the gross earnings of the "Leviathan" had been on the corresponding trip in 1923 and, by dividing that gross sum by the number of passengers, reach a figure that they might submit for the Committee's consideration. This figure was approximately $307, but was never submitted as a definite offer. This sort of an offer did not impress the Committee as the kind of an offer that the Committee dared act on. The Committee felt that they could not, in good faith, use the competitive bid submitted by one company as information upon which a competing company might base its offer.

The Cunard Steamship Company, without any quibbling, offered the "Berengaria" at $270 per passenger.

In view of the fact that the Cunard Steamship Company had given us a definite sailing date fitting in with our necessities, and meeting all our requirements, and had submitted to us a firm offer considerably lower than that even suggested by the

United States Lines, which had not given us satisfaction as to sailing date, there was nothing for the Committee to do but accept their offer of the "Berengaria."

The question of whether or not one steamship or the other carried and served liquor never entered the heads of the Committee or of any of the officers of the Association until it was called to their attention by the articles inserted in the newspapers by representatives of the United States Lines and in statements made on the floor of Congress, and had absolutely nothing to do with the conclusion reached by the Committee, which was based entirely on the consideration of the service to be rendered and the price to be charged for that service.

Travel Information

STEAMSHIP RATES TO ENGLAND

The steamship rates are as follows:

Berengaria and Aquitania

Inside rooms, $270 per passenger.

Inside rooms with bath, toilet or shower, $50 per room extra.

Outside rooms, from $280 per passenger.

Children under 10 years of age, half fare ($135 minimum).

No stateroom will be sold to one adult and one child for less than two full fares.

Laconia

Approximately 20% less than the above.

RETURN PASSAGE FROM ENGLAND

The Cunard Steamship Company will allow a reduction of 33 1/3% from their published rates for return passage on any of their vessels sailing on or prior to August 15th, and 10% for return passage between that date and September 15th. These reductions, however, cannot be applied so as to reduce the price of passage below the published minimum rate.

SAILING DATES TO ENGLAND

Berengaria (52,100 tons) Sails Saturday, July 12th; arrives Saturday, July 19th.

Laconia (20,000 tons) Sails Saturday, July 12th; arrives Sunday, July 20th.

Aquitania (45,647 tons) Sails Wednesday, July 9th; arrives Tuesday, July 15th.

WHAT THE RATES INCLUDE

The rates given herein include transportation from New York to Southampton on the *Berengaria* and *Aquitania* and to Liverpool on the *Laconia*, meals aboard the ship—in fact, all expenses of the trip from New York to the ports named, except the usual gratuities to the stateroom and dining salon stewards, stateroom stewardesses and other steamship employes. The railroad fare from the port of destination to London is not included. The fare from Southampton to London is approximately $4 per passenger and from Liverpool to London approximately $8 per passenger.

TRAVEL IN EUROPE

The Committee in charge will not attempt to arrange for travel anywhere in Europe after the meeting in London. The Committee recommends Messrs. Thomas Cook & Sons, 585 Fifth Avenue, New York; Raymond & Whitcomb Company, 225 Fifth Avenue, New York; American Express Company, 383 Madison Avenue, New York; Lifsey Tours, Inc. 1472 Broadway, New York; George Marsters, Inc., Washington Street, Boston, Mass.; Temple Tours, 65 Franklin Street, Boston, Mass., as reliable travel agents, any of whom will be glad to furnish definite information as to travel, rates, etc. Members who desire to tour by automobile may arrange for automobiles through any of these travel agencies or through the New York office of Daimler Hire, Ltd., 244 Madison Avenue, New York.

No attempt will be made to return in a body.

Members of the Association may be accompanied by members of their families. No assurance can be given of accommodations for non-members who are not members of the families of members, although if a member desire to be accompanied by non-members who are not members of his family, an attempt will be made to arrange such accommodations on either the *Aquitaia* or the *Laconia*.

PAYMENT FOR STEAMSHIP ACCOMMODATIONS

As each reservation is confirmed by the Cunard Steamship Company, the member making the reservation will be called upon to make a deposit of twenty-five per cent (25%) of the price of the accommodation reserved and will be called upon to make the final payment of the balance within a reasonable time thereafter. Tickets will be issued immediately upon payment of the final installment.

Each member taking the trip should arrange at once for his return passage. Any of the travel agencies recommended will be glad to attend to this matter for you, if you do not desire to make your arrangements for your return passage directly with the Cunard Steamship Company.

HOTEL ACCOMMODATIONS

Members are free to make their own arrangements for hotel accommodations in London. The Committee itself can assume no responsibility respecting hotel accommodations but it has arranged with Messrs. Thomas Cook & Sons to engage hotel accommodations for members desiring to make their reservations through them.

Messrs. Thomas Cook & Sons will shortly mail to the members who have made steamship reservations a circular giving the names of the principal hotels available and the range of prices for the various accommodations offered.

Other committees of the Association held important meetings at Philadelphia at the same time as the Executive Committee. There was a conference of the Association's Committee to investigate the practice of bankruptcy and propose remedies, and the committee on bankruptcy of the Commercial Law League, representatives of the National Association of Credit Men, and the council of Federal Judges appointed to consider the bankruptcy situation. The Committee on Professional Ethics and Grievances also held a meeting, as did representatives of the Public Utility Section, who devoted much time to considering the program for the next meeting.

The Executive Committee of the National Conference on Uniform State Laws usually meets at the time and place of the mid-winter meeting of the Association's Executive Committee and did so this year. It discussed the program for the next annual meeting of the conference, apportioned appropriations, and considered, among other topics, a uniform incorporation law, a uniform arbitration act, a uniform mortgage act and a uniform primary act.

AMERICAN LAWYERS ABROAD

By A. J. WOLFE
Chief, Division of Commercial Laws U. S. Department of Commerce

THE events of recent years not only greatly broadened the range of legal business exchange between the United States and the principal European countries, but have also markedly extended the circle of legal practitioners at home and abroad who find it very desirable to become better acquainted with the use of the Bar and with the personality of their confrères.

American lawyers nowadays travel to Europe in greater numbers than is generally realized, and the object of the journey is business rather than pleasure. The personal columns of newspapers which report the movements of Americans in Europe rarely fail to mention a lawyer or two each day, and great numbers of American jurists resort to Paris, London, Berlin and other cities unheralded.

In every capital of Europe there are now resident lawyers, with American training, looking after the legal problems of American corporations abroad or foreign interests in America. In the Association of Foreign Jurists in Paris the nationality of the charter members is very enlightening: Belgian, 1; Canadian, 2; Spanish, 2; English, 6; Italian, 1; Japanese, 1; Mexican, 1; Norwegian, 1; American, 11. Of the four honorary members three are members of the New York Bar.

On my recent trip to England, France, Switzerland, Italy and Belgium, I made a special effort to form the personal acquaintance of all Americans residing in the cities visited by me and engaged in the exercise of the legal profession. I have also interviewed many members of the local Bars whose names were mentioned to me as being interested in professional relations with American colleagues.

In Paris, the American Chamber of Commerce courteously arranged a conference of American lawyers in Paris, which I had the privilege of addressing.

The status of an American lawyer resident abroad has in the course of time undergone much change. A time there was, not many decades ago, when an American lawyer departed for some suitable foreign city for reasons best known to himself, and taking up residence there soon discovered that his American legal training might be put to good account. Frequently, whatever cloud had originally covered his retreat to a foreign refuge had dissipated, and an individual career of usefulness developed. Of late years many younger lawyers, particularly with linguistic attainments, have realized the possibilities from the point of view of a useful career of settling abroad as consultants on American law and for the purpose of supplying to Americans the benefits of the services of some one abroad familiar with the American point of view in connection with their legal problems.

Quite a few foreign lawyers who have formed connections with American embassies, legations and consulates have been men who had married American women and have thus been led to interest themselves in American business, particularly in view of their knowledge of the English language, a qualification not very common in continental lawyers.

The ethical standard of these American lawyers resident abroad and of the foreign lawyers specializing in American business is nowadays a very high one. In the enumeration of these legal connections abroad with American training or affiliations, of course, I should not omit the mention of branch offices of prominent American law firms directly identified with the legal business in some one particular country. These offices are more or less patterned after the offices of the home firm, and include, of course, counsel admitted to the local Bar. The principal qualifications of an American lawyer resident abroad are, to my mind, the following: Admission to the Bar in one of the states and to practice before the Supreme Court of the United States; training and experience in international private law; knowledge of the language of the country; constant interest in the development of American foreign trade, with particular emphasis on company laws and taxation, at home and abroad, and above all the maintenance of a strictly American point of view, understanding of the economic problems of American business abroad, constant touch with the decisions of American courts.

Of course, an American thus qualified can not, as a rule, practice before local courts, and even if Americans may be admitted to the Bar, as is occasionally done in England and other countries where the barrister may be an alien, he should have at his disposal the cooperation of local jurists. His usefulness to American colleagues and clients is not in his ability to appear before local courts, but in his ability to interpret American needs and to protect American interests in a way impossible by direct correspondence between an American lawyer or client at home and a foreign lawyer abroad.

On the other hand, there is a growing demand in the principal foreign countries for the advice of a man on the spot capable of duplicating the services of a lawyer in the United States, with the added benefit of personal consultation.

Many American lawyers confronted with the need of a correspondent in foreign countries consult law lists, which are at times helpful but on the whole of no more use than a list of hotels in New York City to an inexperienced visitor from a country village. Names mean but little. Here the Division of Commercial Laws has been of great assistance to a growing number of American Law firms asking it for advice.

American lawyers needing the co-operation of a lawyer abroad should study the customs of local Bars, which frequently vary from American usage. How many lawyers in America are familiar with the functions of barristers and of solicitors in England? How many American lawyers know that in France an *avocat à la Cour d'Appel* can not have a brass plate on his door nor usually has even his name on his stationery? How many know that contingent fees are impossible under the regulations of many foreign Bars?

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IMPROVEMENT OF THE JUDICIAL MACHINE

In the last of the series of editorials on Law Enforcement three concrete suggestions were made for simple, effective and easily attainable improvements in the administration of criminal justice. Manifestly these suggestions embraced no more than a beginning of the great and pressing task of increasing the efficiency of the judicial mechanism. The subject naturally widens.

What has been said in these columns under the title, "Law Enforcement" has been almost exclusively confined to the consideration of means better to enforce the criminal law. It is of equal importance to consider the enforcement of those laws which secure individual rights and remedies. The whole peace and order of civilization rests upon the assurance of speedy justice to the individual. The judgment which sends a criminal to the penitentiary for a crime of violence is of no higher dignity nor greater importance than the judgment which lends the power of the state to collect a just debt or protects by injunction the infliction of threatened injury or annuls transactions tainted with fraud.

Since the demand for justice is universal and one which must not be denied or delayed, nothing can be of greater or more immediate importance than the improvement of the methods of judicial procedure so that justice be more effectively guaranteed to every citizen freely, completely and promptly.

Obviously, space is here lacking to discuss in detail the defects of the present system or the steps to be taken for the cure of such defects. The American Bar Association through a special committee appointed in 1907 and continued from year to year thereafter, until its work culminated in the revision of the equity rules of the Federal Supreme Court and in the passage of much amendatory legislation in Congress, has done pioneer and fundamental work in this behalf. The seven canons of procedural reform which that committee has formulated and which have been approved by the American Bar Association, by many State Bar Associations, and which have been incorporated into much recent legislation, should be studied by every one who approaches the consideration of the subject now under discussion. These canons , together with discussion and debate upon their form and substance, are to be found in the annual reports of the American Bar Association (Vols. XXXI, 505; XXXIII, 542; and XXXIV, 578). There is, however, one fundamental proposition involved in Canon I which should here be quoted:

> A Practice Act should deal only with the general features of procedure and prescribe the general lines to be followed, leaving details to be fixed by rules of court, which the courts may change from time to time as actual experience of their application and operation dictates.

The importance of this canon can hardly be overestimated. The practice of running to the legislature for permission to improve the methods to be employed by the bench and bar in the discharge of the judicial function is almost as absurd and illogical as would be a municipal ordinance which required the citizen to make application to the City Council for permission to adjust a carburetor or clean a spark plug when his motor car was in need of such treatment.

The task which has seemed interminable, so long as it involved legislative action, becomes easy and simple when it involves only the adoption of a rule of court. It ought, therefore, to be a point upon which the bar of the United States should unite, that hereafter efforts should be centered upon the restoration to the court of its primitive and inherent power to make its own rules as to the method of procedure to be followed by the members and officers of the court in the performance of purely judicial business.

We hear abundant protest by those who have not thought the question out, against the nullification of legislative enactments by the judicial department. The judicial department does not nullify statutes. It is the constitution which nullifies them. Is it not time for us to challenge the right of the legislative department to intermeddle in the administration of justice, by prescribing the

methods to be adopted by the courts and lawyers in the performance of the duties of the judicial department? There are abundant signs that the bar is everywhere turning towards the exercise of the rule-making power as the most hopeful method of improving court procedure.

The following concrete suggestion is, therefore, made: Let each State and Local Bar Association appoint two standing committees, one on amendment of the Law and one on Rules of Court. The duty of the former should include the consideration of the seven canons of procedural reform above referred to and the preparation and report to the State and Local Bar Associations of such measures as may be most effective to make practice in the State courts conform to the principles laid down in the canons.

The duty of the committee on Rules of Court should include the special study of Canon I above set forth, the preparation of rules of court for submission to the judicial officers to the extent the law permits, and advocacy of the amendment of the law, where necessary, to restore this inherent rule-making power to the courts.

THE BOK PEACE PLAN

In another column we print the full text of Plan No. 1469, being the plan selected by the Committee of Award as the best of those submitted in competition for the Bok prize.

Sufficient time has not elapsed since the publication of this plan to permit that thorough and careful consideration which is prerequisite to a worth-while expression as to its merits or demerits. The daily press may be relied upon to furnish a sufficiency of snapshot judgments to satisfy the demand for that commodity on the part of the superficially minded. From the same source there will also be supplied pronouncements to suit those who view such a question from political and partisan points of view.

To the lawyer, suggestions for the substitution of judicial methods for force in the determination of international controversies are of peculiar interest. The man who has studied the evolution of the judicial institution will be interested to note where this proposal follows that analogy and where it departs from it. The chief point of departure is this:

We prohibit the settlement of controversies between individuals by force. We have established courts to which the aggrieved party may apply for a decision according to the right of the matter. We put behind such decisions all the force of the State.

The plan under consideration, however, puts no power behind the decision of the International Court except the moral judgment and public opinion of the world.

In this respect it accords with the position taken by an almost unanimous vote of this association at its last annual meeting, urging that the United States enter the Permanent Court of International Justice with the reservations proposed by Secretary Hughes and set forth specifically in President Harding's message.

It departs, however, from the analogy of the judicial institution among individuals.

Whether this departure be a mistake, or whether it be the one concession necessary for making any progress whatever toward securing peace through justice, is a question which ought to be thought out intently and talked and written about calmly.

One thing is certain and that is that the consideration, study and discussion of this question cannot be considered as a waste of time, unless there is no hope whatever of finding any substitute for war.

THE ASSOCIATION IN MID-WINTER

Increasing membership and the marked expansion of activities of the Association during recent years have naturally given the mid-winter meeting of the Executive Committee a vastly enhanced importance.

But competent as it is to discharge the special and important duties that devolve on it, there is a feeling in many quarters that the season between annual meetings should furnish further and additional opportunities as far as possible for counsel and discussion on the part of various officials actively concerned in the organization's work. It was with this idea in mind that President Saner some months ago suggested that when the Executive Committee met there should be held at the same time and place such allied section and committee meetings as had been provided for by appropriations theretofore made.

This idea still remains to be carried out effectively, but it is a sound and fruitful one that must continue to grow in favor. As for the membership of the Association as a whole, regular mid-winter meetings are of course out of the question. But regional mid-winter meetings of members are among the possibilities of the future.

LAND TITLES IN THE PUEBLO INDIAN COUNTRY

Confused Situation Following Decision of the United States Supreme Court in Sandoval Case—Appointment of a Commission to Investigate Pueblo Titles and Passing of a Statute of Limitations to Protect Certain Purchasers Proposed—Sketch of Our Indian Communists

By Flora Warren Seymour

Of the Illinois Bar, Member of U. S. Board of Indian Commissioners

IT was a winter morning in Washington. The long drawn out hearings before the Senate Committee had come to a somewhat dramatic close the day before. The party of Pueblo Indians that had sat through the hearings were ready to take their departure. Members of the Board of Indian Commissioners were awaiting the call to order for their annual meeting. A stalwart figure girt in a gay blanket stood before them for a moment; a brown face smiled upon them and a brown hand made a gesture of farewell.

"Goodbye, gentlemen," said Pablo Abeyta. "I'm off for home. Washington is a fine place, but Is-le-ta" —he dwelt upon the syllables with a loving intonation —"Isleta is much finer."

And a "Yes" echoed with the goodbyes of at least one member, who fell under the spell of New Mexico years ago and even yet can feel the charm across the long miles.

Isleta—the soft syllables invoke a picture of a land agleam with sand and sunshine, of a sky blue as no other sky is blue, of the magic of far-off brooding hills and the smiling valley at one's feet. This land of terraced adobe homes, piled one upon another long ago for protection against the marauding Apache or Comanche, seems no part of our everyday American world. It takes us back at a glance to the days when the Spanish fathers bore the cross northward over the sands into this very valley, bringing the message of their faith to the peoples of the new world.

"Indios naturales" or "Indios de los pueblos" they called these people of the terraced houses, as distinguished from the "Indios barbaros" of a roving life and more warlike habit. "Native" and "village" Indians they remain to this day, and not so greatly changed, after all, by more than three centuries of contact with the white man. While a sea of innovations rolls about them, the intense conservatism of a primitive folk holds them to many an old custom whose significance is almost lost in the dim past.

But when the Europeans found them, they were already in a stage of semi-civilization that set them apart from the nomadic tribes. They were settled in their villages, they tilled the soil, they practiced a simple system of irrigation, they lived by industry rather than by the adventure of the chase. And, though their welcome to the first newcomer was death, and though many a black-robed missionary fell victim to their resentment as years went on, yet they were not primarily seekers of warfare, and they armed themselves for defense rather than for conquest.

They were not then, and they are not now, a single people. The traditions and customs of the different villages afford many points of contrast. The fifteen or twenty different languages spoken among them come from four different linguistic stocks. They had no common tongue until they had a common conqueror.

Many other innovations came with the Spaniards. The new religion and the new form of government were accepted, at least nominally. At heart the Pueblo Indian still clung to his old ways and beliefs, mingling them with the new in a complexity that baffles interpretation. More readily he took into his industrial life some of the crafts of the European, learned brick making and metal working, welcomed wheat and fruits, burro and sheep and goat. But the new arts and products wrought no such transformation in him as in the Navaho, to whom the sheep brought a new means of livelihood and the horse a new power in warfare.

With horse and gun the more savage Indians became such a terror to the Pueblos that the Spanish suggestion that they concentrate their numbers into a few of their many villages proved a necessary measure for protection. But it also served in the end a purpose against the European when, in 1680, the Pueblos acted for once as a unit. Taos Pueblo, the outermost post against the marauding Indians, furnished the leader of the revolt against the white conquerors. Popé the medicine man, in spite of barriers of language and distance, in spite of the vigilance of the Spaniard, was able to fuse the smouldering discontent of his people into a weapon for a single deadly blow against the invader.

Secretly his teachings were spread from pueblo to pueblo. Revolt and return to their old life were the goal upon which their hearts were set. When the plot was matured runners went from one pueblo to another bearing a kotted rope as signal for the number of days that would elapse before the outbreak. This date was at last anticipated, as news of the intent leaked out and the only hope for success lay in a decisive blow. August 10, 1680, began the siege of Santa Fé, which lasted for ten days and concluded with the setting out of the Spanish colonists on their long retreat to El Paso.

This was the signal to Popé that the old Indian ways were again to be supreme. The blood of hundreds of colonists wiped out the remembrance of an alien rule. Churches and records were burned; the Spanish names that had been assumed were forbidden; a ceremonial bath in yucca suds wiped out the effects of Christian baptism. For a time all was rejoicing.

But success made Popé a tyrant; and the temporary union of the different pueblos carried with it no real principle of harmony. Dissensions broke out very promptly among the tribes. Soon, too, they found that the departure of the Spaniard meant the loss of protection against their ancient enemies, Navaho, Comanche, Ute, Apache. Beset with difficulties without and within, the Pueblo Indians found their twelve years of freedom from Spanish rule full of vicissi-

tudes. But with the coming of a new century they were stilled again beneath the hand of the conqueror.

It was during this period of independence that the King of Spain issued the royal cedula which is the first document in the chain of title which gives the Pueblo Indians today the right to their lands. Previous documents, of course, had been lost in the flames of the uprising. This proclamation of June 4, 1687, was in confirmation of the edict of a viceroy a hundred and twenty years before, granting land to each of the pueblos and forbidding its ownership by any colonists "unless it could be placed a thousand varas of cloth and silk measure distant and out of the way of the settlement and houses of the Indians."

"For," said His Majesty the King of Spain, "by this means they will all have lands to sow and upon which their cattle can eat and pasture; it being just, and very much according to my royal piety, to look after the Indians, who suffer so many injustices and molestations of which I have notice."

Already had begun the encroachments upon Indian lands that are the source of difficulty at the present day. Though just at the moment of the royal edict, it appears, the encroachment was from the other side, and the Pueblo Indians were rejoicing in the destruction of the towns and churches of the Spanish colonists.

The rebellion was but a brief interlude in a long history of fairly peaceable relations with their conquerors. For Spaniard and Pueblo Indian had a common interest and a common fear. To both alike the dread of the flame and the scalping knife. For both the constant menace of Ute and Apache and Comanche. The villages of the colonists and the dwellings of the Indians huddled close together for mutual protection, for a survival that neither could have attained unaided.

So passed a century and a quarter of life together. The Franciscan Fathers were in charge of the different pueblos. The lands of the pueblo were communally held, under the protection of the Spanish Crown. The Indians elected their civil officials, but the controlling spirit was the alcalde, named by the governor and the captain general. This official was a Spaniard as a rule, though in the smaller pueblos he might be a half-breed.

For the inevitable mixing of races went on steadily, and the colonists were no longer of pure Castilian strain. "Coyotes," "mestizos" and "mulattoes" were some of the terms to indicate differing degrees of the admixture of native blood. It is quite obvious that both races are affected by a mixture of this sort. Some of mixed blood remained within the Indian communities; some within the towns of the colonists. Even within quite recent times the desertion of one pueblo village has resulted from the fact that its inhabitants were no longer purely enough Indian in blood to wish to remain separate from their fellow New Mexicans.

But with the separation of Mexico from Spain, a separation due to the efforts of men of all degrees of blood mixture, it was felt that these distinctions of race and color should be cast aside. So declared the plan of Iguala, adopted by the revolutionary government of Mexico in 1821:

"All the inhabitants of New Spain without distinction, whether Europeans, Africans or Indians, are citizens of this monarchy, with a right to be employed in any post according to their merit and virtues."

This was confirmed in the declaration which shortly after made Mexico a republic; later the Mexican Congress passed two decrees to that effect. It is undisputed that the Pueblo Indians had the status of citizens in the Mexican Republic up to the time of the American occupation in 1846.

So far as this New Mexican territory was concerned, the war between Mexico and the United States was a pleasing bit of light opera. The governor of the territory issued a stirring call to arms, then turned tail and fled to Mexico City. There is some hint that this departure was to his worldly advantage, but into these matters it is not always wise to inquire. However he may have prospered, the army of the United States found its march to Santa Fé unopposed. At Las Vegas it seemed desirable to assemble the populace and permit them to observe their leaders in the act of taking the oath of allegiance to the new government. Before they reached Santa Fé, the acting governor had sent out couriers with a note of welcome. His staff and a committee of representative citizens received General Kearney in the old palace; felicitations were exchanged and refreshments served. No doubt the Santa Fé papers reported the affair in the Spanish equivalent for "A good time was had by all."

This was on August 18, 1846; within a day or two, chiefs from several of the Pueblo tribes appeared before the General to express their satisfaction with the change of rule. There had been a native prophecy, it appeared from their story, that the white man would come from the far East and free them from the Spaniard. Their formal submission was received; thus simply the Pueblo Indians came under the sway of the United States Government.

As has happened in other times, peace was slower than war in the making; it was two years later before the treaty of Guadalupe Hidalgo was signed, confirming this territory to the United States; and still other years before the era of military occupation gave way to the peaceful occupation of the Territory of New Mexico.

This treaty, ratified May 30, 1848, provided that a year should be granted the people of the territory to decide whether to cast in their lot with the new country or retire to the old; those who by the end of the year elected to remain within the United States should by that remaining become citizens. The Pueblo Indians, as might well have been expected, chose to remain; and by that fact, it has always been assumed, they accepted citizenship in the United States. This assumption has been verified frequently by decisions of the courts of New Mexico.

"That the Pueblo Indians were declared Mexicans and citizens," says the Federal Court of New Mexico (U. S. v. Lucero, 1 N. Mex.) "no one familiar with the history of the Mexican government can question. That they are still regarded as citizens of the Republic of Mexico is evidenced by the fact that the present President of that Republic (Benito Juarez) is a full-blood Pueblo Indian. Did they retain the character and description of Mexicans or citizens, at the time of the acquisition of New Mexico? . . . I can not find by any legislation or judicial decision that the character of Mexicans or citizens was taken away from the Pueblo Indians as a class of people."

So in its sparsely settled new land the United States found several different classes of people and problems. First, the wild tribes of Navahos, Apaches and Utes, who then and for some decades to come were a constant terror to the more sedentary inhabitants. Second, the Pueblo Indians, more peaceful in nature, more settled in habit, long leagued with the European against their common foe. Third, the "Mexicans," of

Spanish or Spanish and Indian descent, living side by side with the Pueblos and sharing their need for defense against the savage tribes. Fourth, a small and even now not predominant mixture of English-speaking folk. With the exception of the maurading bands, all were citizens of the country.

But a difference in their land tenure existed then and had always existed. The "Mexican"—whether Spanish or mixed blood—held his property, when he was fortunate enough to possess any, under the Spanish laws. The name Pueblo was reserved for those who, whether of full Indian blood or with a Spanish admixture, remained within the walls of their ancient villages and made a part of the little communities whose rules and practices were an inheritance from days long before the Spaniard came to this land. These Pueblo Indians had a form of communism by which the pueblo community was supposed to have the ownership of the lands and the right to dispose of them. Individual plots were allotted from time to time for individual cultivation and use; but this was at best but a life tenure, and always revocable at the common will if not used properly. With this system neither Spanish nor Mexican nor United States Government has seen fit to interfere.

In fact, it did not appear until within the past few years that the Government of the United States had any authority over the land titles of the Pueblo Indians. The treaty with Mexico gave to the United States the right of government over the land, but it could not supersede any rights of private ownership. Any landowner, whether he was called an Indian or a Mexican, retained under the new government the same rights which he had under the old. If he was an Indian who had remained in his pueblo and shared in the communal holdings, he remained a partaker in the pueblo property. If he or his ancestors had left the pueblo for the nearby town and had acquired land by purchase or inheritance, he retained such property when he became a citizen of the United States. So the patents made by Congress to give the Pueblo Indians an evidence of their title to communal holdings could not grant more than the United States had to give. These grants were necessarily made without prejudice to the rights of third parties. All that the United States could give was a quit-claim deed, transferring to the Pueblo Indians its own share; it could not transfer property from one private owner to another.

The courts of the United States would always have the right, on due consideration of all the facts involved, to determine the actual ownership of any given piece of land. But it has never been within the power of either the legislative or the executive to change private land titles. The judicial power alone could settle the question of the encroachments upon the lands of the Pueblo Indians—encroachments dating back for centuries, arising partly from greed, partly from interrelationship, partly from the need of a common defense against "Indios barbaros." Some of these settlers outside the pueblo walls claimed title from Mexican and Spanish grants, as did the Pueblos themselves; some had obtained their land by purchase from the Indian communities; some were intruders pure and simple, no doubt; some, beginning with a valid title, had skilfully enlarged their holdings by less defensible means. All these problems came as an unhappy heritage to the new government of the land.

"It is a subject of great delicacy," wrote J. S. Calhoun, Indian Agent, in the autumn of 1849, "yet, I apprehend, it is easier to dispose of the tribes of roving Indians than the better and more civilized Pueblo Indians. . . . I by no means deem it an impracticable matter to make these people as worthy and useful citizens as will be found in this territory; but this is not the labor of a day."

"The general character of their houses," he wrote again, "is superior to those in Santa Fé—they have rich valleys to cultivate—grow quantities of corn and wheat—raise vast herds of horses, mules, sheep and goats—all of which may be immensely increased by stimulating their industry and educating them in the agricultural arts—for the reasons, in an economical point of view, heretofore given, the Government of the United States should instruct these people in their agricultural pursuits—they are a valuable and *available* people, and as firmly fixed in their homes as any one in the United States.

"Their lands are held by Spanish and Mexican grants—to what extent is unknown—and in their religion they are Catholics, with a certain admixture of an early superstition, with its ceremonials; all of which attaches them to the soil of their fathers—the soil upon which they came into existence, and upon which they have been reared.

"But, in considering this subject, it must not be forgotten, there are a few old Spanish villages to be found in the vicinity of, perhaps, all the Pueblos—and the extent of their grants and privileges is not yet known, and judicial proceedings, only, can reveal the truth in relation to these matters—in this way is the Indian country of the Pueblos checkered, and the difficulties in relation to a disposition of them suggested."

As Agent Calhoun wrote, law suits were already pending in the courts of the land; these, he said, "ought to be quieted without delay, or serious and bloody consequences will result." His eagerness for an early settlement of the controversy about pueblo land titles is apparent in every letter of his correspondence with the Indian Bureau in Washington. All but seventy-five years later, he would find the problem as unsettled as ever.

But in the meantime there have been judicial decisions in goodly number. The Supreme Court of the United States has twice passed upon the status of the Pueblos; and the reversal of opinion in the second of these decisions is the cause of much of the present confusion in New Mexico.

In 1834, while New Mexico still turned its face south of the Rio Grande, the United States passed its laws regulating trade and intercourse with the Indian tribes. All these laws were based on the legal theory that the actual ownership of the soil over which the tribes wandered was vested in the national government. The Indian who roamed the plains had a right of occupation; but the legal title belonged to the nation. Hence arose the right of Congress to pass laws forbidding any one to make a settlement "on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe." For, if the Indian had an absolute title to the land, he could of course grant to any one the right to settle thereon; and the United States would have no power to forbid his entrance.

Under this intercourse act was brought the Joseph case, decided by the Supreme Court of the United States in 1876. Joseph was a settler in the vicinity of Taos Pueblo. The question at issue was the right of the Pueblo authorities to dispose of their land to an outsider. Did they hold the complete title through their

old grants, or were they, like the wandering tribes, merely possessed of the right of occupancy?

After due consideration of the character and history of the Pueblos, the court decided that their land tenure was of a higher sort than that of the wandering tribes, just as the Pueblo Indians themselves differed entirely from "the nomadic Apaches, Comanches, Navahoes and other tribes whose incapacity for self-government required both for themselves and for the citizens of the country the guardian care of the General Government."

"The Pueblo Indians, if, indeed, they can be called Indians," the decision went on to say, "had nothing in common with this class. The degree of civilization which they had attained centuries before, their willing submission to all the laws of the Mexican government, the full recognition by that Government of all their civil rights, including that of voting and holding office, and their absorption into the general mass of the population (except that they held their lands in common) all forbid the idea that they should be classed with the Indian tribes for whom the intercourse acts were made.

"If the Pueblo Indians differ from the other inhabitants of New Mexico in holding lands in common, and in a certain patriarchal form of domestic life, they only resemble in this regard the Shakers and other communistic societies in this country, and can not for that reason be classed with the Indian tribes of whom we have been speaking. . . .

"Turning our attention to the tenure by which these communities hold the land, we find that it is wholly different from that of the Indian tribes to whom the act applies. The United States have not recognized in these latter any other than a passing title with right of use, until by treaty or otherwise that right is extinguished. And the ultimate title has always been held to be in the United States, with no right in the Indian to transfer it, or even their possession, without consent of the Government.

"The Pueblo Indians, on the contrary, hold their lands by a right superior to that of the United States. Their title dates back to grants made by the Government of Spain before the Mexican revolution—a title which was fully recognized by the Mexican Government and protected by it in the treaty of Guadalupe, by which this country and the allegiance of its inhabitants were transferred to the United States."

The effect of this decision was to confirm the opinions and judgments that had before that time been rendered with respect to the Pueblo Indians. As they were further advanced in civilization than the nomadic tribes, better versed in the arts and industries of ordinary life, so they were recognized as deserving the treatment accorded to civilized and industrious people. But with the greater freedom and privilege of their status went a greater responsibility. If their land was their own they must use their own judgment in the disposition of it. The Supreme Court had decided that the United States had no right to interfere.

Our highest tribunal had spoken. Through many years the decision went unchallenged. The Pueblo governors managed the lands of their people as they had always done, and back of every sale was the assurance of the Supreme Court that they had a perfect and complete right to make it.

Then came the day, long-delayed, when New Mexico was to become a State instead of a Territory. In their keen desire for statehood, the New Mexicans accepted without protest or indeed without overmuch consideration the stipulation in the Enabling Act which provided that the lands of the Pueblo Indians should henceforth be "subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States." But in point of fact it was not a change of land tenure that was intended by these words; the primary purpose was to bring the Pueblo Indians within the scope of the laws forbidding the sale of liquor in "Indian country."

For these were pre-Volstead days and the white man, himself still at liberty to purchase and consume fire-water, thought it best to deny that liberty to his red brother. It had already been decided that if the red brother had attained citizenship he could not be forbidden to buy liquor; and it was commonly conceded that the Pueblo Indian came under our government as a citizen. The only way, therefore, to keep away intoxicants and to forbid his making the wine in which the pueblos traded, was to extend to all his lands the character of "Indian country," into which the introduction of any intoxicating liquor was forbidden. All this occurred at a time when the Indian Bureau was particularly active in the enforcement of all laws against the Indian use of liquor, its chief liquor suppression officer having received in his forays against bootlegging in Oklahoma the soubriquet of "Pussyfoot" Johnson.

So the new provision as to the Pueblo Indians was not thought of at first as a matter of land holdings at all; and when cases began to be brought under the new provision, they were as a matter of course cases concerning the introduction of liquor into this newly denominated "Indian country."

The case which finally reached the United States Supreme Court and brought about a reversal of the Joseph decision of nearly forty years before, was that of one Felipe Sandoval who was charged with introducing liquor into one of the Indian pueblos. The United States District Court had followed the Joseph decision and declared the Pueblo Indians to be possessed of "the right to take, hold and dispose of their property." The Supreme Court took a different view. It did not base its decision, however, upon the clause in the Enabling Act; for, after all, it could not logically be maintained that by that Act the citizens of the Territory of New Mexico could give to the United States a right over pueblo land which they themselves had never possessed.

Instead, in a lengthy decision the Court went into the entire history of Indian guardianship in the United States. It set forth the fact that the Government of the United States had by a long course of conduct constituted itself guardian and trustee for all Indians; that in the years since American occupation there had been appointed agents for the Pueblo Indians, to aid and instruct them; that schools had been provided for Pueblo Indian children; that inasmuch as the United States would not have given these benefits as mere gratuities, it must be assumed that they were given by reason of the supervisory powers of the Government. It was therefore decided that the Pueblo Indians had come into the United States in a condition of tutelage and had remained in that condition. The introduction of liquor into an Indian pueblo was a violation of a law of the land.

This decision caused great surprise to the New Mexican courts and lawyers, who for a generation had accepted the Joseph decision for what it had apparently been—the last word of the highest judicial authority. It caused great surprise, no doubt, to as many of the citizens of the State as were able to comprehend what it meant. It might have caused great

surprise to Felipe Sandoval, the defendant; but he was dead, some time since, and never knew what posthumous renown was to come to his mellifluous name.

But even so, the realization that this decision challenged all land titles within the boundaries of any Indian grant was slow to come. For so many years had the pueblo title been beyond question that this new and unexpected cloud was not quick to cast its shadow.. Gradually the people of New Mexico awoke to the fact that the lands they or their grandfathers had purchased from the Pueblo governors could no longer be deemed surely their own. For if the United States were guardian of the Pueblo Indians, then it had always been their guardian, though both guardian and ward were utterly unaware of the relationship, though the relationship had been disavowed in set terms by the Joseph decision. And as wards the Pueblo Indians had never had the right to dispose of their lands, though in that disposal they had the sanction of the United States Supreme Court. As wards, they could now disavow any previous sale, though made in good faith and under the highest judicial authority. As wards, they could repudiate the bargains they had made, believing themselves unhampered by wardship. And the United States must stand back of these disavowals and repudiations.

And since no statute of limitations runs against a ward or a minor, this cloud was cast equally upon the sale of last year and the cession of three centuries ago. Every one of the "Mexican" villages in the shadow of the pueblo walls was on property to which it could claim no right. Even though the poor New Mexican citizen who tilled his little plot of ground there had it by direct descent from parent and grandparent for generations back, he could be dispossessed without redress. Even though he had bought it with the hard savings of a lifetime, he had toiled and saved in vain. Even though he were himself of Indian descent, he could claim no part of the protection so fully accorded to those whose ancestors, unlike his, had chosen to remain within the pueblo communities.

Such is the situation in New Mexico today. In legal language, the Indian has all the rights and the settler the equities. Translated into common speecn, this means that in many cases where the strict letter of the Sandoval decision will authorize the taking back by the Indian of lands which he sold for a fair return, the view of everyday honesty demands a consideration of the rights of the innocent purchaser. There are many purchasers, not innocent, who will be justly dispossessed by the application of this decision; but along with the unjust will go the just as well, a crowd of poor harmless, unlettered Spanish-speaking herders and farmers and villagers whose sole offense against the law is that they are living in the country of their ancestors.

Adhering strictly to the Sandoval decision, courts can do nothing but decree their eviction. A test case is awaiting decision. The only possible source from which an alleviation of this unhappy situation can come is the Congress of the United States. It lies within the province of our national legislators to lay down rules whereby the proper discrimination can be made, to effect some plan which will make possible the expropriation of those who in both law and conscience are wrongfully upon the lands of the Indian, leaving undisturbed those whose eviction would be a cruelty and an injustice.

It is a tangled situation. We have had but a glimpse at the main features of the difficulty. The complications of the Spanish law, the lack of adequate records, the wide gap between the intricate technicalities of the situation and the limited mental grasp of most of the parties concerned—all these things pile confusion upon confusion. Someone said of the Schleswig-Holstein dispute that there were only two people who had ever known what it was about, and the other one had completely forgotten. The Pueblo land controversy is in somewhat similar case. Few will ever have the patience and industry for the endless searching into old conflicting records, for the tireless listening to confused testimony, that is necessary to get even the simplest foundation laid for its consideration.

Three bills were brought before the last Congress proposing a method for remedying Pueblo land difficulties. The first of these, the Bursum bill, was the occasion of a greater amount of newspaper and magazine discussion than has been visited upon any Indian matter since the days, more than forty years ago, when Mrs. Helen Hunt Jackson crusaded in behalf of the Red Man. It is a salutary thing that public interest in the Indian has been awakened; but an unfortunate thing that the occasion of the awakening was a problem so intricate that the average writer for the newspapers could not present it intelligibly, nor the average reader grasp it clearly. The result has been the awakening of a storm of emotion and the befuddling of the mental status of many well meaning folk. The result has been, too, the defeat of the Bursum bill, and very fortunately so; but it would be unfortunate if the defeat of the one measure should have created a feeling which will make it impossible to pass a better considered one. The Jones-Leatherwood bill, introduced on behalf of the committee which led the agitation against the Bursum bill, mingled general legislative provisions with appropriations of money in a way that is condemned by all students of legislative procedure. Further, its legislative features are so general in their terms that they could be carried out successfully and fairly only under the supposition that the individuals charged with its fulfillment could attain perfection of knowledge and character. It may be said that individuals fulfilling this requirement could solve any problems, however inadequate the law under which they worked.

As a result of the long hearings before the Senate committee, there was introduced at the close of the session a bill known as the "Lenroot Bill." Senator Lenroot had been chairman throughout the hearings and the deliberations which pointed to a compromise of all the various interests involved. The salient features of the bill are the appointment of a commission to investigate Pueblo land titles and the fixing of a period of limitations beyond which titles may not be disturbed—thirty years for claimants without color of title and twenty years for those with color of title. This bill, like the two others, failed with the close of the session. The form which legislation will take in the next Congress remains to be seen; but that there must be something done to relieve the situation is obvious. The need is as acute as ever.

The Board of Indian Commissioners, a body of ten chosen by the President "from among men eminent for intelligence and philanthropy," has for half a century been acting in the role of disinterested adviser to the Executive. The Commissioners serve without pay. They visit and inspect Indian schools and reservations, and recommend changes where they think the need lies. Commissioner Walter George Smith, a member of the Board and a former president of the American Bar Association, spent several weeks among the Pueblos

this past summer, investigating their needs and considering their problems. He "was at pains to seek the opinion of those who were interested or who represented interests, as well as disinterested parties of all shades of belief." He reported that "there seemed to be a general approval of the scheme of the Lenroot substitute."

A year ago, in its consideration of pending and proposed legislation, the Board refused its approval to the Bursum bill. This fall, in its meeting at Lake Mohonk, the Board passed a resolution expressing the belief that the principles involved in the so-called Lenroot bill afford a wise and just method of solving the problem.

Every delay serves only to make the matter more difficult of adjustment. This winter's session of Congress should see a bill passed which will at least pave the way to a settlement of these many vexed titles. The calm decision of the best informed and most judicious minds will be needed if the situation is to be met with any degree of adequacy. It is as knotty a problem as Congress has ever had to meet.

DEALING WITH OVERGROWTH OF STATUTE LAW

How Kansas Commission to Revise the General Statutes of the State Dealt With a Situation Typical of Many Other Commonwealths and Cut Down Its Statutory Law One Half—Work Receives Prompt and Overwhelming Legislative Approval

By F. DUMONT SMITH

Member of Kansas Commission to Revise the General Statutes

THE enormous growth of a statutory law has forced upon lawyers the paramount necessity of revision. The condition of Kansas when the legislature met in 1921 was typical of most of the other states. Kansas had not had a revision since 1868—53 years. Its statutory condition is fairly set forth in the report of the Commission to Revise the General Statutes presented to the legislature in 1923.

"In that time (53 years) the whole face of the world has changed, no part of it more than Kansas. Kansas was then a pastoral state, dependent wholly upon agriculture. Its towns were mere cross-road settlements or villages of a few hundred people. The population was widely scattered. Industries were few and scant. There was no communication except by horse or ox team. Manners were simple, and the ideal of government was a limited interference with private rights.

"Today, while retaining its vast agricultural interests, Kansas has become a great mining and manufacturing state. Railroads, telegraph and telephone lines have been built; new and dangerous instrumentalities of production and distribution have been introduced. The discovery of coal, gas and oil in vast quantities, the establishment of muniments of title to these underground treasures, and development and operation, with attendant dangers and complexities, have required a whole new body of law. Villages have grown into great cities, with their congested population and complicated problems of government. Man is no longer isolated from man, but daily and hourly rubs elbow. And above all, the whole ideal and concept of government has changed. The state has become a vast and complex machine, dealing more and more intimately with the life of the individual, and the whole relationship of man to the state, and state to the individual, has changed completely. New ideas of regulation in every phase of human life from the cradle to the grave have taken the place of the old let-alone policy. We are doctored, sanitated, examined, regulated, prohibited, enjoined, instructed and coerced in every relation of life, business, social and domestic. No man knows what he may or may not do without consulting the statute book. This is not a criticism of the modern and constantly accelerating development of the police power, but a mere statement of facts.

"Inevitably these profound and swift changes in the whole structure of human life, industrial and economic, governmental and social, have resulted in vast legislative confusion, both in purpose and expression. Kansas is the paradise of governmental experiment. Nor are we content with simply experiment. We pile experiment upon experiment. Before the experiment has been tried out we amend it or throw it out on the ashheap of governmental failure.

"The brief sessions of our legislature permit small time for careful preparation of bills and consideration of new laws in their relation to the old. In addition to this, hasty methods of legislation have tended to increase with its volume. Toward the close of the session the great number of measures pressing upon the attention of the legislature denies consideration or deliberate thought. Measures are poured into the hopper and ground out without relation to the legislation of the past. When the legislator conceives there is a wrong to be remedied, he prepares a bill and it is passed. No examination is made to consider whether there is already a law sufficient to remedy the wrong, or if such exists whether it should be amended; nor is any time taken to prepare a bill that shall properly amend the old law, connect the new law with the old, and save the difficulty of repeals by implication. A simple section of the statute may amend by implication half a dozen sections. It is quite common for the house and senate to pass identical bills and message them to each other. The house passes the senate bill, the senate passes the house bill, and both appear upon the statute book. Generally they differ slightly in context, and no one knows which is the law. One legislature will repeal a statute, and the next legislature will amend the repealed statute, and no one knows what is the law.

"The constitution contemplated that an act should not be amended unless the old act was clearly set forth and the old act repealed. There

has grown up by recognition of the courts a practice of repeals by implication, which largely grew out of the brevity and necessary haste of our sessions. The courts say that they do not favor repeals by implication, but the courts of Kansas are extremely loath to set aside the legislative will except on the most imperative consideration. Nine times out of ten the repeal by implication is favored, and no lawyer and no person concerned with the legislation can know until the court has passed upon it whether this implied repeal will stand; and the situation is worse where the repeal is partial instead of total. The question is how much of the old statute is repealed, how much remains.

"When the constitutional amendment of 1905 forbade local legislation, the growing cities of Kansas demanded for their needs special legislation, and this was obtained by limitations of population—"cities over 75,000," etc. The cities outgrew these limitations and new legislation was demanded. General in form, but special in fact, as population was constantly shifting it was impossible to tell to what cities this legislation applied at any certain time. One city legislated itself out of a board of education by one of these restrictions.

"The result of this fifty-three years of legislation is registered in the Chinese puzzle of the compiled laws of 1915 and the Session Laws of 1917, 1919, 1920, and 1921. A vast amount of litigation with its resulting loss and cost has been compelled by the confusion and conflict to which we have alluded. A justice of the Supreme Court of more than twenty years' experience informed the writer that the cost of this litigation to litigants and the public directly imposed by this confusion from these contradictory, overlapping statutes, these repeals, or partial repeals by implication, amounts in every biennium to far more than the total cost of this revision of the statutes, and the publication of the revision, if the legislature shall adopt it, before a single volume has been sold.

"This vast change has left behind many old landmarks of the past, and rendered many statutes obsolete; but they remain on the statute book. The safety of those who intrust themselves to the steamboats on our great navigable rivers is still protected on our statute books. It is an offense for the captain of a steamboat to interfere with the landing of a ferryboat on one of these streams. Cities are still permitted by statute to regulate dramshops and tippling houses.

"It is still an offense to sell liquor within one mile of a camp meeting or on a fairground, or to sell or give liquor to an inmate of a soldiers' home. It is still "prima facie" evidence of guilt under the intoxication-liquor law to have a government license to sell liquor. Instances of this obsolete legislation could be multiplied."

The legislature of 1921 adopted the bill prepared and introduced by Judge F. L. Martin of Hutchinson, which is Chapter 207 of the Session Laws of that year. The bill provided for three Commissioners to be chosen by the Supreme Court; appropriated $25,000 for the expense, of which the sum of $1,000 was allowed to each Commissioner for his services. The Act authorized the Commission to make a contract "for the revision, compilation, and editing" of the Statutes. It also authorized the Commission to employ an expert for that purpose and directed the Commission to superintend the same and cause the Statutes to be printed at the State Printing Plant. The Supreme Court appointed former United States Senator Chester I. Long of Wichita, former State Senator Hugh P. Farrelly of Chanute, and the writer, as the Commission.

We discovered at the outset that it was impossible to let the work by contract. None of the lawbook publishing houses would take the job unless they could print it and make a profit on that side, but the Act required the printing to be done in the State Printing Plant. We found it impossible to employ any expert who was competent to do all of the work called for and so the Commission buckled down to the job of itself revising the Statutes. We employed R. E. McIntosh, who had compiled and annotated the Statutes of 1915, as Annotator, Mr. C. D. Yetter, who had compiled the Session Laws in the office of the Secretary of State for five sessions, and Mrs. Ida Wolf, who had been associated with him in that work, as Compilers.

While each member of the Commission had had considerable Legislative experience, neither they or any of their employes had had any experience in revising Statutes, which, of course, is a very different thing from compiling. From the very first perplexing legal questions began to arise the scope of our authority, how far we could go in revising, what was meant by "editing," but the most difficult questions were those arising from partial repeals by implications. The Commission employed former Chief Justice Frank Doster as Counsel for the Commission and we found his advice invaluable.

Our first step was to send out a questionnaire to every State and County officer, including the Judges of the Supreme and Districts Courts, asking them to give us their suggestions as to any conflicting, overlapping, or partially repealed Statutes. The response to this was fairly general and very helpful.

In the meanwhile and as the first step, the compilers were preparing what we called "Dummy No. 1," taking the compilation of 1915 and adding to it in the proper classification, the Session Laws of 1917, 1919, 1920, and 1921. In the course of this and from previous experience, Messrs. McIntosh and Yetter presented many suggestions to the Commission. Each of these suggestions or questions was embodied in a report of which there were six copies. These reports went first to Mr. Pipes, our Secretary, and from him with his comment to Mr. Yetter, from him to Mr. McIntosh, and then a copy sent to each member of the Commission with the recommendations of these gentlemen. At the next meeting of the Commission, these reports were gone over and a decision made embodied in an order which was made a part of this report. There were something over a thousand of these reports which are now on file with the Secretary of State showing exactly what was done with each suggestion, including the final order of the Commission. This, however, does not indicate by any means the amount of work. For instance, the single report on cities covered more than twelve hundred Sections. The report on bonds covered over seven hundred and the report of schools over twelve hundred. The Commission in the meanwhile was making a

thorough study of the entire body of the Statutes. We are all working lawyers not inclined to fads or theories and determined as far as possible to preserve the classification to which Kansas lawyers had been accustomed for more than fifty years. To that end we continued the uniform custom in Kansas of an alphabetical arrangement of the chapters. Our main task was compression. It had been the custom, for instance, with reference to bonds in granting power to a municipality for some new public purpose such as a community building, to grant the power of eminent domain, sometimes placing the condemnation in the hands of a City Commission, sometimes with the Board of County Commissioners, sometimes with the Probate Court and sometimes with the District Court. At the same time each Act would completely cover the issuance of bonds for this purpose, providing for notice of election, denomination of bonds, time of payment and rate of interest. So we had four differed kinds of exercise of the right of eminent domain and fifty-seven different varieties of bonds.

We prepared a general Statute on eminent domain providing for all condemnation proceedings in the District Court and where condemnation was spoken of simply used the phrase "as provided by law." This eliminated a large amount of superfluous matter. We wrote twenty-six general Bond Sections on the preparation of which a great amount of care was expended and we believe that we have now the simplest bond law in the United States. This enabled us to eliminate the many separate provisions with regard to bonds by simply inserting the phrase "shall be issued according to law."

Our Code of Civil Procedure had been simply thrown together. There was no logical order or arrangement. We revised this by classifying the matter so as to conform to the ordinary progress of a law suit, beginning with venue, limitations, and the like, pleadings, special remedies and proceedings, summons, evidence, trial, and so on. In our present compilation, the article on evidence is inserted after the article on trial. Apparently the compilers thought that lawyers tried their cases first and looked up the evidence afterward. Some of them do, but it is not good procedure.

One of the exacting and very tedious jobs arose from the fact that the different State Boards had at different times borne different names. We had at one time a State Penitentiary Board, Board of Regents for the State University, another for the Agricultural College, etc. These Boards had been frequently changed and consolidated until finally all their powers were merged in one body known as the Board of Administration. All of this phraseology had to be changed. This was true of the different Boards which at one tme or another had controlled the Public Utilities. As I have remarked before, we followed pretty closely the classification with which the Kansas lawyers had been familiar, but some changes were made. For instance, the provisions regarding real property such as conveyances, trusts and powers, mortgages, and wills were widely scattered. We made a new Chapter on real property under which is placed everything that has to do with the ownership and transfer of real property during the owner's life time. Under personal property everything dealing with that form of property. Under Decedents' Estates we placed everything that has to do with property upon the death of its owner.

As the time approached for the meeting of the Legislature in January, 1923, the most serious question pressed itself upon our attention: How should this revision be enacted? As prepared for Legislative scrutiny, the last Dummy No. 4 in a steel filing case presented the result of our work. In a report to the Legislature of more than three hundred pages we had described every change made in the Statutes, every Section repealed, every Section dropped as obsolete, every Section amended with the amended Section in full.

To start with, it would have been impossible to treat the revision as a Bill and read it through in open session as our Constitution provides. Again if it were split up among various committees as is the custom, it would have been impossible to secure the proper attention or preserve the harmony of the Revision that we had worked so hard to provide. We accordingly, upon the advice of Judge Doster and other competent lawyers, decided to have the Bill enacted by reference. We found that this plan had been followed in several states, notably in Georgia. Practically every state in the Union has adopted the Common Law by mere reference. Accordingly a short Bill of ten Sections was prepared and presented in both houses. The two Judiciary Committees of the House and Senate appointed joint Committees to consider our Revision. They took our printed report and divided it up among subcommittees who carefully and very speedily completed their work, made a number of suggestions as to changes which were adopted by the Commission and embodied in a supplemental report. When the Bill for the adoption of our Revision came before the Senate, it passed unanimously; in the House, the vote was one hundred and five to thirteen. In addition, the Legislature appropriated $75,000 to complete the work and print the Statutes and increased the compensation of the Commission from one to three thousand dollars each.

The Legislature provided that the Statutes to be printed in one volume should be sold for $12, by far the cheapest revised Statutes now sold. Such an overwhelming approval of our work was naturally gratifying to the Commission and was some recompense for our long, arduous and tedious work, much of which had to be done out of office hours, as we are all busy lawyers.

It will be noted that this Dummy No. 4, which will be deposited with the Secretary of State with our certificate, will be in effect, the enrolled Bill to which the courts will turn when recourse to this source is necessary.

Immediately following the adoption of the Revision we then began final work of including the Session Laws of 1923, the completion of the annotations and the index. After examining the work of several experts, the Commission employed Mr. Uriah Barnes of Charleston, West Virginia, author of the well known Barnes Federal Code and reviser of the West Virginia Statutes. We believed the index to be perhaps the most important thing in the whole book, as it is the key which unlocks its contents. We believe we have an excellent index, very comprehensive, containing over thirty-seven thousand lines. Mr. McIntosh had been withdrawn from the annotation work and placed

on Revision work in order to get our report ready for the Legislature. The work required that each part of it should be carried on with practical unity. Whenever one department got into a jam we would throw force from the other departments on to it. Accordingly when Mr. McIntosh returned to the annotation, Mr. Barnes helped him for a time and part of the time we had seven people working on the annotation. They examined more than forty thousand citations, of which over twenty thousand were found pertinent and included in the volume. We made a fixed rule that no citation should be longer than ten words and found that it was possible to indicate to the lawyer the sense of the decision in practically one line of type. After it became apparent that we could get the work out within the time we had set, we decided to have the Federal Constitution annotated. The Senate of the United States at great expense had caused to be prepared the complete citation of the decisions of the Supreme Court of the United States on the Constitution, making a volume of 735 pages. This by our system of compression was boiled down to 91 pages. We believe that this is the only Revision that has complete, up to date annotations to the Federal Constitution.

Our Compiler, Mr. Yetter, devised a greatly improved method of numbering the Sections. The first numeral preceding a hyphen is the Chapter number, the first succeeding numeral is the number of the Article in the Chapter and the numerals following indicate the number of the Section. For instance, 28-301 shows at a glance that the Section cited is the first Section of the third Article of Chapter 28 of the book. It is in effect the application of the modern method of numbering buildings in cities.

One of the crosses we Kansas lawyers have to bear is the frequent reference in the Supreme Court decisions to a certain Section in the compilation of 1901 for instance; when the new compilation of 1905 came out these numbers were obsolete, as all the Section numbers had been changed. At the end of the volume we have a table tracing these Sections through the various Session Laws, but in the future this will not be necessary. Whenever a Section is amended and there is a new compilation, it will be amended by the present number and put in the place of that Section. A new Section will be placed at the end of the proper Article in the appropriate Chapter without disturbing the other Section numbers in the volume. Fifty years from now if the Section is still in the Statute book, it will have exactly the same number as it has in this Revision and a decision handed down next year interpreting a Section in this Revision will be just as intelligible to the lawyer then as it was when rendered.

The result of our work when stated in terms of the size of the volume is really starting. The General Statutes of 1915 contains two thousand seven hundred and eighteen pages. To this we have added the Session Laws of 1917, 1919, 1920, 1921, and two sessions in 1923, and the Revision contains eighteen hundred pages, including one of the most extensive indices of any Statutes in the country and eighty pages of annotation of the Federal Constitution. It is bound in dark Keratol with the title embossed in gold on the back, making it a part of the book.

The State Printer, Honorable B. P. Walker, gave us the most intelligent and enthusiastic cooperation throughout, setting aside everything else to accomplish this work. The result is really a triumph in book making. Ten thousand copies were printed, of which it is estimated eight thousand can be sold. As the Commission will return a considerable sum of the appropriation unexpended, the sale of these volumes will probably pay the total cost, leaving the state absolutely in the clear.

The Revision became effective December 27, 1923, and the lawyers of the state were able to procure their copies during that month. The Commission takes pride in the fact that the Revised Statutes of Kansas, 1923, were placed in the hands of the lawyers of the state before the close of that year, something unusual.

The increasing volume of law, statutory and judicial, is becoming almost an intolerable burden upon the American lawyers. Efforts are being made on every hand to condense and cut down the volume of law which the lawyer must examine to determine the rights of his client. Kansas has taken a forward step in this direction. It has cut down its statutory law more than one-half.

CURRENT LEGISLATION

LEGISLATIVE PROHIBITIONS OF UNFAIR PRACTICES

By J. P. CHAMBERLAIN

THERE are cases in the books which hold that where competition is started against a business with the intent only of destroying that business, acts otherwise permissive will become tortious and be the basis for damage suits.[1] This idea, which the courts appear to apply hesitatingly and only in very strong cases, has been seized upon by the legislatures, and the intent to destroy the business of a rival has been made criminal when it inspires specific acts. The acts attacked are said to be a not unusual method of applying business euthanasia to a rival, effective but without evidence of violence. A large concern will cut prices in a particular locality, depending on its profits elsewhere to make up its loss until the offending local dealer has come to terms or gone out of business,[2] and the reverse, a manufacturer will pay in one district higher prices for raw materials than prevail generally, to drive out of business a rival concern that

1. Tuttle vs. Buck 107 Minn. 145, and other cases included in Oliphant's Cases on Trade Regulation, p. 263 ss.

2. See description of practice in State vs. Drayton 117 N. W. 768, 82 Neb. 254.

draws its supply from that local territory. Such acts with the intention of destroying the business of a competitor, are made illegal, irrespective of the intent to create a monopoly or to restrain trade, though they are also declared illegal if the intent of the doer is monopoly or restraint of commerce.

The result may be to create a complete or partial monopoly, and as the acts are done not in combination or by several persons, but by a single powerful business, unit, the usually anti-monopoly statutes will not apply.[3] Thus the legislative campaign against monopoly and to protect "fair trade," took a long step from the codification of the common law against combinations in restraint of trade or monopolies, to declaring illegal specified acts which the legislature considered as tending to destroy competition. Under the anti-monopoly acts a general rule was laid down to be applied by the courts to specific situations; under this new type of law, the legislature describes the acts it brands as outlawed, and any one can tell from reading the statute what he is forbidden to do.

The legislatures first directed their effort against local price cutting. The extension to local price raising came later, but it, too, has been accepted in a number of jurisdictions. At the last session Ohio p. 39, Sec. 6402-1, Michigan 208, Idaho 121, Arkansas 617, South Dakota 195, Wyoming 82, and Wisconsin 406 deal with this phase of the attempt "to so adjust matters as to preserve the principle of competition, and yet guard against its abuse to the unnecessary detriment of the individual."[4]

The simplest act is that of Ohio which penalizes local price raising in buying dairy products. Idaho limits her price raising act expressly to purchasers of dairy products for manufacture, as Ohio does inferentially, and includes a prohibition of local price cutting which seems to apply also to distribution of fluid milk. South Dakota added to her general act prohibiting discrimination between localities in buying commodities in general use,[5] a new statute Sec. 195 applying only to dairy products. The new law prohibits such acts for the purpose of injuring or destroying the trade of a competitor, while the general law forbids only local price raising to the detriment of "regularly established" dealers. Arkansas already had an act forbidding local underselling and local overbidding, in respect to any commodity in general use, with special limitation on trading in beef, coal, oil and manufactured products,[6] but the legislature at the last session added a statute to make criminal local overbidding on dairy or poultry products, grain or cotton seed. The act is not limited to purchase for manufacture or storage, but includes any purchase for sale. Michigan directs its effort against purchasers of "potatoes, grain or beans for the purpose of resale." Wyoming shows an interesting tendency. Her legislature was so well pleased with the existing law affecting dairy and poultry products, that it included "coal, oil, gasoline, natural gas or iron ore, or anything produced from the soil of the State of Wyoming," in the prohibition against local discrimination in buying. Wisconsin introduces a very important change. It drops from the section of its law condemning local price raising, the element of intent to create a monopoly or to destroy the business of a competitor. The act of discrimination between localities by paying more in one than in another is made criminal unless justified by freight rates, marketing charges or quality. This section applies only to purchasers of dairy products "for the purpose of manufacture." Wisconsin did not make so drastic a change in her local price cutting section. The element of intent still lingers there, but it need no longer be the intent to "destroy" the business of "a regularly established dealer," it is enough if the intent be to "injure" his business.

Not all the law makers content themselves with making the act of discrimination in buying, which they term "unfair discrimination," a crime. The charters of offending corporations are forfeit at the suit of the Attorney General in Idaho and South Dakota, and injunctions against the guilty party at the application of the Attorney General to prevent his buying the article listed in the act, are permitted by Arkansas and Idaho. A further drastic sanction, making void, contracts in violation of the law, was adopted in Idaho.

A further means of enforcement, and perhaps a recognition of the act itself as a tort, is the right given the injured party to sue for treble damages and an injunction by Idaho. He may have an injunction even though he has suffered no actual injury. This raises the question whether in any case a person injured by an act made unlawful by one of these statutes would not be liable to respond for damages caused thereby? The statute has declared the act of local price raising illegal, if intended to injure or ruin the business of a competitor; can he not recover the losses caused by this illegal act? Under the new Wisconsin act, can he recover without showing intent? Overbidding is illegal in itself. The cases holding that neglect of a statute requiring the use of certain safety appliances for the protection of others, machine guards, lights on automobiles, are proof of negligence, are not wholly in point. There the act was clearly a tort if the person liable was negligent. Not obeying the statute was negligence, so he had to respond in damages if he had no defense, contributory negligence, for example. These statutes make it unlawful to do the specified acts, negligence is not involved, but an act otherwise legitimate made unlawful by the statute, is the cause of the damage.

The gravamen of the crime is the intent of the accused. "The statute clearly makes the purpose with which the act is done, the controlling element in the offense."[7] If the intent is to destroy the business of a competitor, an act otherwise lawful, becomes a crime, and entails serious consequences. But intent is not always easy to show, and the rule in criminal law which puts the burden on the state of showing guilt without reasonable doubt, might well interfere with prosecution. So at least thought the legislatures of Arkansas and South Dakota which made proof of the fact of overbidding *prima facie* evidence of the guilty intent. Wisconsin tried this method but gave it up at the last legislature as unnecessary when it changed its law in respect to price raising. The new section, however, which permitted justification of higher local prices for specified reasons, provides that the justification need not be negatived in the complaint or information, and if it is so negatived, no proof in relation to it need be made, but the defendant may make the justification.

Perhaps most significant of a possible next step is the extension of the Wyoming act to discrimination in buying, from discrimination between localities, to

3. State vs. Central Lumber Co. 24 South Dakota 136, 123 N. W. 504, 42 Law Rep. Ann. N. S. 804, note.
4. Tuttle vs. Buck, supra.
5. §4366 Revised Code.
6. Crawford and Moses Digest §10324.
7. State vs. Drayton 117 N. W. 768.

include also discrimination between individuals. So if a purchaser pays more to one individual than to another, for the purpose of "creating a monopoly or destroying the business of a competitor," he will be liable to punishment. The old type of act made punishable only price raising in a district as compared to prices paid in another district, wholesale price raising; this act goes to cases where a buyer approaches individually the persons supplying his competitor and offers them individually higher prices than he pays to other individuals either within or without the district. Nor is Wyoming alone. Wisconsin, too, extends the prohibition from local discrimination to individual discrimination, forbidding paying more for dairy products, or selling any commodity in general use at lower prices, to "persons, firms, associations or corporations in any locality in this state" than offered to others "in any locality in this state."

Wyoming in 1923 introduced yet a new idea. Chapter 86 amends a former anti-monopoly and anti-local price cutting act, by making it a crime to list prices locally on any commodity in general use, "to gain unjust or unreasonable profits," which is to be assumed might come after the monopoly was established. In addition Chapter 86 forbids the charging of a higher price in the state for articles manufactured or produced in the state, than the articles are "sold for" in another state, "the freight rates being equal, or less, from the point of production or distribution." Exception is made where the different price is made to meet competition.

This method of curbing what the legislature considers unfair competition has been sanctioned by the courts. A statute prohibiting local underselling, the first step taken, was found within the police power of the state. "The act in question only provides against the use and sale of one's property for the purpose of destroying the business of a competitor,"[8] and so is a reasonable means for the protection of the property of the competitor, not an unreasonable interference with the free use of his own property by, and freedom of contract of, the person or corporation restrained. When the later application by the legislature of the principle to local price raising came before the courts it also was sustained.[9]

The South Dakota law forbidding local underselling of any commodity in general use, was attacked on another ground. It was said to be unreasonable classification as discriminating against the business men selling in several localities as compared with those having only one store. Any act of competition is an attempt to destroy the competition of rivals and the legislature could not make illegal, price cutting by men who did business in several districts, and permit price cutting between local merchants in a single region. The Supreme Court of South Dakota, [10] and that of the United States[11] did not agree with this contention. The Supreme Court said that the legislature could "direct its law against what it deems the evil as it actually exists, without covering the whole field of possible abuses."

The laws only continue a tendency of American state legislatures especially in the West, to meet this particular method of gaining a complete or partial monopoly, and to make possible competition of the smaller business men with great business units. It evidences the policy of encouraging the continuance of the small, local business against the chain stores, the great distributing and manufacturing corporations, which are spreading over the country. The particular stress laid on overbidding in dairy products indicates a fight for existence by the country creameries against great milk manufacturing companies, and the extension of the rule to grain and other farm products when bought for storage, looks like a legislative battle in a campaign of local elevators against companies controlling strings of elevators all over the state. Local underselling is generally forbidden in the states which have adopted this policy, and is made commonly to apply to all commodities in general use. Local overbidding is less frequent, and is often limited to specified goods, usually farm products. The legislatures are not equally severe in the penalties they inflict. Fine and imprisonment, all provide, some expressly declare contracts void (they would in no case be enforceable, as carrying them out would be a crime), usually the charter of a domestic corporation is forfeitable and the right of a foreign corporation to do business in the state may be taken away for violation. Clearly the lawmakers are in face of a situation which they regard as threatening. The work of the last sessions make it appear that the feeling has not subsided.[12]

It is worth noting that the Clayton act, which applies to interstate commerce the principle of condemning more or less loosely specified acts in restraint of commerce, as distinguished from the general anti-monopoly rule of the Sherman act, in its original draft prohibited discriminations in price between purchasers, "with the purpose or intent thereby to destroy or to injure the business of a competitor." This language was subsequently changed to prohibit discriminations where the effect may be "to substantially lessen competition or tend to create a monopoly in any line of commerce."[13]

JOSEPH P. CHAMBERLAIN.

8. State vs. Drayton 117 N. W. 768, 82 Neb. 254.
9. State vs. Bridgeman and Russell Co. 117 Minn. 186, State vs. Fairmount Creamery Co. 133 N. W. 895.
10. State vs. Central Lumber Co. 24 South Dakota 136, 123 N. W. 504, 42 Law Rep. Ann. N. S. 804.
11. Central Lumber Co. vs. South Dakota 226 U. S. 157.
12. Arkansas Crawford and Moses Digest §10324, California, General Laws §4207a, Indiana, Burns Statutes §3892a, Iowa Code §6205, Kansas Gen. Stats. §6430, Minnesota General Statutes §8988, Montana, Pol. Code §2360, Nebraska Compiled Statutes §3432, North Dakota Pol. Code §2846, South Dakota Rev. Statutes §4365-6, Utah Penal Code §8336.
13. Mennen Co. vs. Federal Trade Commission 288 Fed. 774, p. 778.

Minima

Moscow denies the Soviet government is plotting against American institutions. It may be remarked, however, that very few plotters are forward in declaring their intentions.

While the Legal Aid Committee is correct in stating that there are many poor litigants in this country, it is but simple justice to add that there are a great many very good and persevering litigants with us also.

The place for the indeterminate sentence, if anywhere, is in the courts and prisons and not in the briefs and arguments of counsel.

The situation in Mexico has at last apparently settled down to its customary instability.

Divers statesmen appear to be at present extemporizing life-long convictions against the power of the U. S. Supreme Court to declare statutes unconstitutional.

If the U. S. Supreme Court were not criticized, it would be a grave reflection on the foresght of the Fathers. They predicted it would be and that is why they made it strong enough to stand it.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in Current Legal Periodicals

I. Among Recent Books

CITIZEN OR SUBJECT? By Francis X Hennessy. New York. E. P. Dutton & Co. 1923, pp. 464. This book is an illuminating commentary on those portions of the Constitution in which all American citizens are now particularly interested. But it is not a law book. It deals with simple facts—facts on which depends the validity of every law made to interfere with human rights. It is the only book, since the Constitution was adopted, to emphasize the difference in identity between the two makers of changes in our Constitution, the State legislatures and the conventions of the American people assembling in each State, and between their respective abilities to make changes. The difference in ability was the reason why the Constitution could not be referred to the State legislatures and was referred to the conventions of the American people for adoption. Repeatedly in the book Chief Justice Marshall testifies that everyone then knew that no legislatures or governments ever could make an Article like the First Article which gave government power to interfere with any human right.

Mr. Hennessy makes adroit use of the interest in the Eighteenth Amendment to rivet attention on the overwhelming testimony that the people need not lose their belief that the Constitution protects adequately their every known human right despite the "supposed" Volstead Act, "the only law in America directly interfering with human freedom, which was enacted under a grant of power made by government to government."

What impresses the reader is the way in which the author has his witnesses destroy to a certainty the one assumed fact upon which the whole superstructure of the Eighteenth Amendment rests, namely, that the State legislatures, *through the Constitution*, received the power to amend it. His witnesses testify to his jury, the American people, that nowhere in the Constitution is any power of any kind given to the State legislatures —neither the power to make constitutional Articles, nor any other power. His witnesses are the men who drafted the Constitution, the men who made it, the Constitution itself, and the Supreme Court. They testify that the Constitution found and kept it a legal necessity that every proposed gift of government power to interfere with human right must be referred to the conventions of the American people; that the Eighteenth Amendment never became part of the Constitution because it was referred to the State legislatures who could not make it; that our generation has assumed the Fifth Article to have a meaning which its own language makes impossible; that the Fifth Article is the command of the whole American people, in their conventions, dictating *how* changes in their Constitution shall be made.

No reader of the book misconceives the meaning of that word *"how."* For Mr. Hennessy's challenge is that the Fifth Article, recognizing two makers of Articles, commands each *how* it must exercise its *existing* power, but *gives* no power to either. This challenge differs vitally from any previously made to the Eighteenth Amendment. Every former challenge conceded that the Fifth Article gave power to the State legislatures and disputed the extent of that power. The new challenge denies, as "sheer assumption," that the Fifth Article gives any power to the State legislatures or to the conventions which made it.

If these are the facts—and Mr. Hennessy's evidence is overwhelming—they are the most effective facts for our effort to re-establish the Constitution in the minds and hearts of the people, obviously the real purpose of the author. And he adopts the very method which experience taught Hamilton and Madison was the one way in which to bring about that end, namely, to give the people plain knowledge of the fact that the Constitution does protect the many human rights which they never surrendered to any interference by their American government.

Most unique is the author's method of presenting his evidence to his jury, the American people. The method awakens their interest and makes great appeal to their sense of fairness. In the Convention which drafted the Constitution, in the thirteen conventions which made it, the reader listens to the testimony of the Americans who made the Fifth Article. And he comes from those conventions understanding its meaning as it was understood by those who made it.

If the reader has the illusion that the State legislatures ever ratified a single Amendment which gave government a new power to interfere with any human right, the short chapter—entitled "Seventeen Articles Respecting Human Freedom"—entirely dispels the illusion. In this chapter each of the seventeen Amendments made by the legislatures prior to 1917 is examined. Not one of them added to the enumerated powers given to government in the First Article. Each was the kind of constitutional Article which the legislatures could make before the Constitution and its Fifth Article were even proposed—the kind that did not create government power to interfere with human freedom.

Then the author brings us to the story of what he persistently calls the "alleged" Eighteenth Amendment. And we find this entertaining story most instructive. In Congress and in Court, we listen to the advocates and opponents of the Amendment. Naturally they talk about the Fifth Article. But, as they invariably discuss the extent of the power they assume that Article gave to the State legislatures and to the conventions which made it, we find nothing in all their testimony to shake the knowledge we brought from those conventions, that the Constitution gives—*and that the Constitution states that it gives*—no power of any kind to the State legislatures.

Nowhere in the book is the reader permitted to forget that the people of America and their leaders, when they were making the Constitution, had a common knowledge that action of the conventions, men-

tioned in the Seventh and Fifth Articles, was direct action by the people themselves, and that action by the State legislatures, mentioned only in the Fifth Article, was action by government and not by the people themselves. This common knowledge is used to focus attention on the Tenth Amendment, which was demanded by the conventions when making the Constitution, and which states that the Constitution nowhere gives any power to the State legislatures.

That Tenth Amendment reads: "10. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Throughout the entire book the author makes impressive use of this plain declaration in the Constitution itself that "The Constitution *gives* nothing to the states or to the people." The statement just quoted was made to the Supreme Court in the famous case of Gibbons v. Ogden, 9 Wheat 1. And, keeping ever in mind this Tenth Amendment declaration that the Constitution only *reserves* to the "states respectively" or to "the people" what each already had, the book steadily contrasts the declaration with the fact that the Fifth Article merely mentions, as makers of new Articles, the State legislatures which always speak for the "states respectively" and the "conventions" which are "the people."

And the author, at p. 216, pertinently asks whether anyone can deny that the following is an accurate paraphrase of the Tenth Amendment declaration:

> We, the people of America, assembled in our conventions, have granted to the *American* government enumerated powers of the First Article. They are the only powers *of that kind* delegated to any government, by which it can interfere with our individual freedom in our capacity as American citizens. All powers, which the citizens of each state have hitherto had and which we have not taken from them herein, we have left with them; and the citizens of each state can grant so much of said powers as they please to their own government to govern them as citizens of that state. All other powers, outside those we have granted to our government to interfere with us and those we have left to the citizens of each state for their own respective exercise, we reserve exclusively to ourselves, in our capacity as citizens of America. And, if any government should deem it wise that any one of these powers (which we so reserve exclusively to ourselves) should be exercised, we have provided in the Fifth Article the mode of procedure in which *we*, assembled in our conventions, can *Constitutionally* exercise it or grant it to the government which wants to exercise it.

That the Tenth Amendment *does* state that the Constitution gives nothing to the "states respectively" or their legislatures, and that the Tenth Amendment makes it impossible to argue that the Fifth Article gave the State legislatures any power, Mr. Hennessy establishes by witnesses which cannot be denied. In establishing these facts, he quotes impressively the Supreme Court of 1907, criticizing counsel of the United States Government for not knowing that the Tenth Amendment does so state. And, in connection with this criticism, the author of the book makes and proves this statement: "Without a single exception, every argument during the last five years, whether for or against the Eighteenth Amendment, has deserved the criticism of the Supreme Court for the fact that such argument neither knew nor considered the meaning of the Tenth Amendment."

After these arguments of the last five years have told their own story, in an interesting chapter, "The Challenges That Failed," the author has the Supreme Court itself establish that nothing decided in the famous National Prohibition Cases of 1920 will hamper that Court when it meets the new challenge of Mr. Hennessy's proposition. In these Cases, as the book says, the Court *wisely* wrote no opinion. The entire short decision in the seven cases is given. In it the Court announces that it merely states the court's "conclusions *on the question involved*." Each conclusion is stated in a numbered paragraph of three or four lines. None of the four arguments, which the Court denies to affect the existence of the Amendment, even suggests the new challenge of this book.

The last chapter, "The American Citizen Will Remain," contains many cogent reasons for the author's absolute certainty that the new challenge must and will prevail in the Supreme Court. But the facts on every phase of the book are impressive reasons for that certainty. They will insistently demand answer to the question which is the book's title, "Citizen or Subject?" They will demand that answer from the people, from our leaders, and finally from the Supreme Court itself. "The Court will never be called upon to exercise a higher or graver trust than to answer the question 'Citizen or Subject?' when the real challenge is made to the new attempted constitution of government of men entirely by government. The Court is not unaware that the whole American people established their Constitution for the one purpose of protecting individual liberty."

In essence the simple proposition of the book may he stated in these few words of the reviewer: The American in any State knows but two governments which can interfere with any of its human rights. They are the government at Washington, which gets its power of that kind directly from the citizens of America, and his state government, which gets its power of that kind directly from the citizens of his State. He knows no government or governments which can give his American government any new power to interfere with the human rights of the American citizen. He knows that the two governments, which can interefere with any of those rights, are each limited by Constitutions, the government at Washington by the American Constitution and his State government by that Constitution and also by the State Constitution. But the "supposed" Eighteenth Amendment has no existence unless it be assumed that there is a third government, master of both other governments, which can interfere with any of his human rights and which can create new government power to interfere with any of them. The "supposed" Amendment assumes that this third government consists of any thirty-six State governments, acting in combination, and that its power is unlimited by any Constitution. He knows that, if the assumption that there is such a third government of the American people is a true assumption, he himeslf is a subject and not a citizen. And, when the facts of the book are known and considered, they make manifest the utter absurdity of the assumption that there exists any such third government of the American individual.

With this proposition to present to the Supreme Court, backed by the overwhelming testimony of the book, the author makes the statement of his own conviction:

> And it is simple fact that the Supreme Court must and will—when the real challenge is at last made—decide that the Eighteenth Amendment is not in the American Constitution because it was made by governments and not by the "conventions" of the Fifth Article. Otherwise, in the face of history, in the face of the record of the "conventions" of the American citizens, and in the face of all that the Supreme Court has hitherto decided, the Court must decide that the American citizen has never existed.

The possibility that there should be such a decision is absolutely beyond conception.

This reviewer is convinced. He agrees entirely with the author that the Supreme Court must and will decide that the Eighteenth Amendment has not been adopted—that only new conventions of the people, in conformity to the Fifth Article command to those new conventions, can ever make an Article which attempts to give government a power to interfere with a human right.

The book is an object-lesson in politics. Mr. Hennessy presents an entirely new issue of fact about the Eighteenth Amendment—by far the most important issue. His new issue supplies the only reasonable explanation of the alarming results which have followed in the wake of the Eighteenth Amendment. His new issue, exactly the same issue as that which once divided us into Americans and Tories during the Revolution, explains why so many Americans will not respect a government created power to interfere with any human right. While we had the general conviction that the Amendment had been adopted, no relief from its alarming results was in sight. But "Citizen or Subject?" supplies the antidote to the Eighteenth Amendment poison in our Constitutional system.

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Rational Basis of Legal Institutions, by various authors, with an editorial preface by John H. Wigmore and Albert Kocourek, and an introduction by Mr. Justice Oliver Wendell Holmes. The Macmillan Company, New York, 1923.

This is a new volume in the Modern Legal Philosophy Series, edited by a Committee of the Association of American Law Schools. It contains extracts from the writings of modern and semi-modern students on (A) Liberty, subdivided as follows:—(1) Individualism and State Control in general, (2) Competition, (3) Contracts. (B) Property, subdivided on the basis of the various theories of private property. (C) Succession. (D) The family, and (E) Punishment.

Cases on the Law of Contract, by John C. Miles and J. L. Brierly. The Clarendon Press, Oxford, 1923. This book contains a collection of the leading English cases on the subject of Contract, designed for the use of students. It is broader in scope than the ordinary American case book in that it includes capacity of parties, mistake, misrepresentation, fraud, and some material on negotiability, agency, and quasi-contract. On the basic divisions of contract the material collected is splendid, but it is hardly more than enough for illustrative purposes in teaching this subject.

Industrial Democracy, by Glenn E. Plumb and William C. Roylance, B. W. Huebsch, Inc., New York, 1923. In this book there is set out the Plumb plan for the reorganization of industry, the plan not being limited to the railroads, but including the coal industry, problems of marketing, questions of credit, agriculture, and foreign trade.

The JOURNAL has received volumes 1 and 2 of *Outlines of Historical Jurisprudence*, by Sir Paul Vinogradoff, Oxford University Press (American Branch), New York, Vol. 1, 1920, Vol. 2, 1922. The first volume of this comprehensive survey of the history of law is devoted to an introduction dealing with the relation of law to the sciences, with a statement of the tenets of the different schools of jurisprudence, and with an extended discussion of tribal law. Vol. 2 covers the jurisprudence of the Greek City, and volume 3, which is in preparation, will deal with mediaeval jurisprudence in western Christendom.

Corporation Manual for New York. Albany: Matthew Bender & Co., 1923, pp. xxxii, 465, price $5.00. Wide changes in the statutes dealing with corporation law were instituted by the 1923 session of the New York state legislature. To meet the resulting need this manual has been prepared. It contains not merely the new acts, but also the old ones so far as they remain unrepealed, with a table showing the disposition made of the various sections of the old acts. Editorial notes in the body of the new act point out changes or new matter. In the appendix is a large number of forms, which have been revised to meet the new requirements. All this material is rendered available by a lengthy index. The book should be highly useful to the New York practitioner. The new laws and the related and unrepealed old ones are also printed, without discussion beyond a synopsis, in a pamphlet, *New York Laws Affecting Business Corporations*, Fourth Edition, by the United States Corporation Co.

Problem of the International Court Today

(*Continued from page 18*)

vanced. No valid objection to American action as proposed by Secretary Hughes, has been developed in all of the discussion during these ten months. So that Mr. Hughes' proposals remain as acceptable today as on February 17, when he wrote his letter to President Harding.

Service Rendered By the Court

Meanwhile, the Court has gone ahead with its work. It has already vindicated the practically universal judgment with which its establishment was hailed by the lawyers of the world, including the lawyers of the United States.

Gradually but surely, therefore, a change is going on which is extending the field of law in international relations. A world court is no longer a dream, it is a dream come true. The United States is not asked to assist in establishing a court. It is merely asked to join in maintaining an established Court.

Whether the United States takes any action in support of the Permanent Court of International Justice or not, it should be clear that that Court is going on, that it will continue its work, and that Judge John Bassett Moore and his colleagues will continue to render valuable service to the world. The United States may go before the Court, whether it joins in support of it or not. The situation will not be greatly changed one way or another. What is important is that the United States should not lose an opportunity to vindicate the hope of the men who fought the war for a governed world.

The main reason for selecting the Berengaria for the London trip of the American Bar Association was that the ship was large enough to accommodate the passengers and also big enough to conform its sailing date to the absolute necessities of the Association.

PROBLEMS OF PROFESSIONAL ETHICS

IN Massachusetts, we are told, there is a somewhat strict law regarding the observance of the seventh day of the week, commonly called Sunday.

Again in many states there are statutes, or municipal ordinances having the force of statutes, intended to limit the speed of automobiles.

There is also in Illinois a statute requiring an owner or occupant of land not to permit a Canada thistle to "mature its seed" on his land. A breach is punishable by a fine.

Likewise there is the federal law prohibiting smuggling; and there are numerous laws prohibiting gambling.

Then there is the eighteenth amendment and the national prohibition act.

What is the feature common to all these laws and to many others similar, so far as the scope of this inquiry is concerned, in their nature? The feature regrettably common to them all is that they are all frequently and persistently violated.

The fact is, is it not, that violating "Sunday laws," unless worship is interfered with, breaking automobile speeding laws, unless some one is hurt, Canada thistles, unless some farmer apprehends that he will be damaged, buying smuggled cigars and drinking bootlegger's liquor, are matters which pass almost unnoticed?

Moreover, the protests evoked by reason of violations of most of the foregoing laws are from certain groups only of the community. The "fundamentalists" earnestly invoke the sanctity of the Sunday law; the family of a man maimed or killed by a speeding car loudly proclaim the lawlessness of the speeder (though little attention is usually paid to their cries). Nobody, generally speaking, except the farmers, pays the slightest attention to Canada thistles as they bloom and go to seed; nor does anyone, except customs officials, concern himself with our fellow-citizens who, on returning from abroad, fail to declare dutiable goods.

Similarly many smokers buy smuggled cigars—or cigars said to be smuggled—and seem not to forfeit thereby the regard of their countrymen. And the eighteenth amendment, constantly violated by professional and amateur bootleggers, is faring badly—especially when citizens otherwise respectable drink liquor they know has been manufactured, sold or transported, in violation of the constitution; and though not thereby violating the constitution they still violate the national prohibition act.

Now amid the multitude of infractions of law and in the welter of laws imperfectly sustained by public opinion, what is the position of the lawyer? Is it in any respect different from that of other citizens, and if different, in what respect? We note first that lawyers, as a class, have sworn to support the constitution of the United States and of the state in which they practice their profession and to discharge the duties of their office faithfully and to the best of their ability. Thus a lawyer who violates the eighteenth amendment also violates his solemn oath. It seems clear, therefore, that as to lawyers the eighteenth amendment has a force which may fairly be considered as sacred. It has the backing of their oath of office.

But how about lawyers who play cards for stakes—large or small—or who by themselves or through agents under their full control violate speed laws or any of the other laws we have been considering? It is difficult to see how in these matters a lawyer is to be held to any higher degree of accountability than are other persons.

The writer was once fined for riding a bicycle in the evening without a light. His light had gone out. He didn't know this. He violated the law—was it a "sacred" law?

Yet we lawyers talk so much of the "sanctity of all law" that we perhaps over-shoot the mark. If we stop to consider the matter, no amount of prating about the sanctity of the law is going to make the Canada thistle law as sacred as the law prohibiting murder or treason. Some laws are "sacred" within the commonly accepted meaning of that term; but it is misleading to group all laws together without discriminating, and to attempt to secure for a law of trifling importance or for one whose breach involves no moral turpitude, the same respect which all decent citizens will accord to a law which protects them against murderers, traitors and thieves. In assigning moral culpability for breach of the statute, moral grounds still play and should play an important part; and not a little of the disrespect for law is really caused by failing to discriminate between trifling statutory offenses on the one hand and on the other the basic principles which, whether on the statute books or not, guide the conduct of decent citizens. To say that a driver who exceeds the speed limit but does not hurt anybody and is not prosecuted brings our laws into disrespect is untrue and misleading. He does no such thing. But those who insist that slight infractions bring the whole body of law into disrepute are the persons who really—though law abiding themselves—inculcate and promote, so far as their voices reach, general disrespect for law whether in important basic matters or in trifling details.

Though it be true that, except as their oaths of office place attorneys in a class apart from their fellow-citizens, lawyers are not in any degree higher than are other persons, answerable at the bar of a court of morals—still, through public addresses, and in private utterances, lawyers continue to invite hostile criticism. They persist in taking part in a dress parade. They assure each other and their fellow-countrymen that all law is sacred. This is mere "window dressing." It isn't true and they know it isn't. Let's be honest about this and admit that while some, perhaps many, laws have sanctity and to violate them denotes moral turpitude—yet there are other laws, mainly statutory, whose violation involves little more than the annoyance of being caught in transgressing them.

RUSSELL WHITMAN.

As one object of the AMERICAN BAR ASSOCIATION JOURNAL is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this JOURNAL assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated merits attention.

POLITICAL AND ECONOMIC REVIEW

Equality Before the Law

IN a learned and able article, "Roman Concepts of Equality" (*Political Science Quarterly* for June), Max Radin of the University of California reaches the following conclusion:

> The Roman state began with a parity of full citizens —the *patresfamilias*. It ended in the Diocletian monarchy, with a vast dove-tailed and differentiated system of practically hereditary castes. The principle of the city state, that all full citizens were peers and that no non-citizens had rights at all, had been modified for the world state into the principle that citizens as such were not legal peers and that non-citizens scarcely came into contemplation.

The beginnings of the differentiation of citizens seem to have been based on differences in wealth, and to have manifested themselves in a sort of Rotten Borough system of unequal voting power and in differences in punishment for the same crime. The writer points out analogies with our own country, where the Declaration of Independence and the Bill of Rights "were subscribed to by men who enforced property and religious qualifications for the suffrage." He doubts whether at present "all men stand on an equal footing in the actual administration of justice"—because of the advantage which the rich man has in the ability to command the services of the best legal talent. Equality before the law is at most, in his view, an ideal, not an actuality, just as it became a Stoic ideal in the later days of the Empire, when every vestige of the actuality had vanished.

Even as an ideal, however, it seems to me that we cherish no such aim; we cherish it only as a label. True, nearly everyone now has a vote. True, again, the same punishments seem to be provided for the same crimes. But this is because the same label is used to stigmatize very different physical acts, and different labels to characterize the identical act when done by different persons. When Dives steals a crust from Lazarus, the punishment is the same (apart from the distinction between grand and petty larceny)—as when Lazarus steals a purple robe from Dives. Each act is called "larceny." But the physical act of taking a purple robe without someone else's consent is always larceny when committed by Lazarus (who owns no robe), while it need not be larceny when committed by Dives. While we may punish in the same way two persons who commit acts which are agreed to be larceny, still we do not attach that label to the act without first inquiring who the performer of the act may be—the owner or another. The owner of many robes can perform with impunity many physical acts which would be punished if performed by the man who owns rags alone.

Ownership and Different Kinds of Liberty

Elsewhere the writer of this department has pointed out in greater detail than is here possible (see "Law and Justice," vol. X of the *Proceedings of the Academy of Political Science*, p. 50, July, 1923) that ownership is a curtailment of the liberty (i. e., of the freedom from legal restraint) of the non-owners; that if the owner himself uses the thing owned, ownership *promotes* the owner's liberty (but in the sense of freedom, *not* from legal restraint, but from the disturbing acts of private individuals); that if the owner does not himself use the thing owned, but derives a revenue from its ownership, the ownership promotes his liberty in a third sense, i. e., freedom from those impersonal restraints inherent in a lack of that revenue; and that to the extent that this revenue *stimulates* the owner to produce wealth, his ownership promotes in the consuming public a liberty in the sense of freedom from those impersonal restraints inherent in a general shortage of wealth. Ownership may thus curtail one sort of liberty in the non-owners and promote another sort. But *to the extent that the owner's income does not function as an incentive to production*, a revision of the owner's power (by taxation, price regulation, etc.), might enlarge the freedom of the non-owners quite as much as it would curtail that of the owners. The justification of any particular readjustment of the system of ownership must be tested, therefore, not by balancing the desirability of other things (safety, health, etc.), against the desirability of liberty, but by balancing one set of advantages which *includes* various kinds of liberties against another set which includes other liberties. For if freedom from legal restraint, or freedom from unequal legal restraints, were the only things to be weighed against safety and health as narrowly conceived, then ownership itself, with the inequality of its restraints, would fail to find justification. In modern society, ownership is a paternalistic device, imposing unequal legal restraints on liberty, but bringing about various offsetting advantages, including freedom from less personal restraints on the conduct both of owners and of non-owners. A more detailed discussion of the merits of various concrete readjustments of ownership, and of the economic power based on the threat to withhold labor, is to be found in the present writer's "Coercion and Distribution in a Supposedly Non-Coercive State" (*Political Science Quarterly* for September), which is a review of Professor Thomas N. Carver's "Principles of National Economy."

The *practical* liberty (freedom from *impersonal* obstacles) of the propertyless may thus be enlarged in certain very important respects by curtailing his *legal* liberty (freedom from *the law's* restraints). This legal restraint, of course, has certain results adverse to the non-owner's practical freedom in addition to those results which promote it. It is the legal prohibition of the use of any of the existing land or productive apparatus without the owner's consent that accounts, in part, for his subjecting himself to the direction of an employer; and this is of course a curtailment of his practical liberty in another direction. By altering the distribution of our rights of ownership, it is conceivable that fewer manufactured and more agricultural goods might be produced, and a larger proportion of the work done might be work which the owner himself performs, a smaller proportion work done for hire. The net result for the average man it would be difficult to unravel. The contrast between the two types of labor, from the point of view of the laborer, is pointed out in a communication by Kia-Luen Lo in *The Freeman* for May 2 (the spelling is *The Freeman's*). "The industrious labour of Chinese peasants is, to my mind," he says, "much heavier, at least quantitatively, than the assigned work of the factory-workers in the West. But there is a great difference in the nature of their work. The Chinese peasants, though earning far less from the fruits of their

labour with reference to its bare economic value, *do labour for themselves*, and thus *enjoy their work*. When they are tired, they may rest if they are so inclined. They may sit on the grass beside the field, sing their folk-songs and call forth distant responses from their neighbors, neighbors with whom they have a natural sympathy. . . . You (of the West) are proud of your industrial civilization, but you miss the very essence of life, without which life is meaningless." According to an editorial in the same number of *The Freeman* ("A Policy of Destruction") the motive of the recent Bursum bill, which would have deprived the Pueblo Indians of the lands secured to them by treaty with the government, was to make them work for employers. The destruction of the Pueblo culture as well as the bad faith apparently involved render this particular instance of indirect compulsion to do hired labor peculiar. Where these are absent, something can be said on the other side. Freedom to cultivate land and hence to abstain from hired labor *may* result (though not necessarily) in a reduction of production and a backward culture—which may or may not be too high a price for emancipation from monotonous hired labor. This evil of reduced production is pointed out in a passage which is interesting, whether true or not, in an uncomplimentary and perhaps overdrawn article by C. L. Edson in *The Nation* for May 2, "Arkansas: A Native Proletariat," in the series "These United States." Says Mr. Edson: "In a word, Arkansas is a land of raw materials and raw people. The people take hold of the materials and fashion themselves such wealth as they desire. And their desire is the only limit to their wealth. They own it all in fee simple; there are no masters to oppress them and they occupy without molestation a land unbelievably rich and a climate most favorable. But they desire little. No ambition consumes them. Their wants are limited to their needs and normal human needs are not much after all. Hence their merry motto: 'I ain't got nothin', and I don't want nothin'.' In the great war of man against nature, science against ignorance, Arkansas has remained a neutral."

Whatever may be the facts as to Arkansas, the point in favor of some system of ownership which will indirectly force men to work for an employer, is an interesting one. It is a point which is usually assumed to apply to the natives of tropical countries. It is usually thought that the western world will be deprived of much needed tropical products, and the natives will sin against our western standards of industriousness, unless some sort of compulsory labor is introduced. Actual slavery is said to exist in some parts of Africa, but the compulsion can be exerted in a manner less crude by vesting the ownership of most of the productive land in white settlers. The incidental legal duty imposed on the natives to desist from direct production for the satisfaction of their wants, forces them indirectly to work for the whites, and under rather harsh conditions. Thus are the natives redeemed for civilized standards of industry, and thus are the tropical products obtained, on which western industry depends. It is conceivable, however, that the products might be obtained by a different method. The following paragraphs may be of interest in this connection. They are taken from the beginning of an article, "The Negro Takes Stock," by W. E. Burghardt Du Bois, in *The New Republic* for January 2.

> Chief Amoah III of the Gold Coast spoke at the London session of the Pan-African Congress. He is small, black and earnest, a descendant of ancient rulers of the Gold Coast, never enslaved; and now a cocoa merchant resident in London many years. He was a significant figure.
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> For Mr. Hutchinson, a London mulatto barrister, also from West Africa, told us one night how, a quarter of a century ago, he himself planted the first cocoa tree in that region and how today Nigeria and the British West Coast are the greatest cocoa-producing areas in the world. But singularly enough the economic development there has not been at all according to modern theory. It has not been a case of the advent of foreign-owned capital with captains of industry driving native slaves, but a development of peasant proprietorship on small plantations with black owners working in a leisurely way as they wish, being their own masters, and yet turning out this mass of products.

That different sorts of competing liberties may be valued differently by different persons is brought out in an article by Robert W. Bruère in *The Survey* for May 1, entitled "The Main Business of Industry." It is not, he says, merely freedom from physical poverty that the workman needs, but freedom to exercise some discretion in the work he does. "The more the workers are freed, or win freedom from financial handicaps, the more acutely do they feel the spiritual handicap of their inferior industrial status." "Fortunately an increasing number of employers have come to recognize that a prime obligation of industry is that it shall be a training school in the arts of management and production. Unfortunately not many of them take the trouble to meet this obligation. The owners of the Columbia Conserve Company in Indianapolis, Indiana, are still almost unique in this respect."

ROBERT L. HALE.
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Cromwell on Congested Codes

"'An ungodly jumble,' was how Oliver Cromwell described the statute book of his day, and the ambiguity of Parliament, increased by the modern practice of 'legislation by reference,' has kept the terse description in frequent use."—*The Law Journal*, Dec. 8, '23.

Judicial Character of British Speakership

"The Right Hon. John Henry Whitley, Speaker of the House of Commons from 1921, was reelected without opposition on the 26th inst. to his old constituency —Halifax. The Speaker of the House of Commons by virtue of this great position, which is now of an absolutely judicial character, makes no political addresses when he seeks re-election from his constituents. Unlike most members, he never publicly discusses politics. He is outside the arena of party politics. Since the Reform Act of 1832 there is only one instance in which the electors in a Speaker's constituency were called upon to go to the polls after their member had been chosen to the Chair."—*The Law Times*, Dec. 1, '23.

Local Bar Organization

"In every section of this state we ought to have and can have a local bar association that is a power in its community. The combined strength of these local associations, both as to membership and accomplishment would, through proper cooperation, come to the state association. Our profession, if thus organized, would wield its old-time influence and perform its highest function, by wisely directing public opinion, improving our laws and securing a better administration of justice."—From address before Colorado Bar Association by Wilbur F. Denious.

TRIAL BY JURY: AN INEFFECTIVE SURVIVAL

We Have Clung With Pathetic Earnestness to Unrecognizable Remnants of a System Which Is Today Marked By Inadequacy and Inefficiency as a Means of Ascertaining Facts and Affords Frail Security to Natural and Acquired Rights

By Bruce G. Sebille
Of the Brawley, California, Bar

THOSE who have had occasion to observe the methods employed in the administration of judicial principles, have necessarily been confronted with a realization of the inadequacy and inefficiency of the judicial trial by jury. Its defects are so patent as to compel the attention of even the casual observer, and to one compelled to cope with it as an essential factor in his personal concerns, it assumes the characteristics of the fabled dragons of mythology, frustrating the objects of commendable endeavor and reducing to wretchedness the victims it cannot destroy. The jury, established in answer to the peculiar needs of the age that produced it, exists today without a vestige of reason, the altered conditions occasioned by man's progress having made it ineffectual and inexpedient as an agency of legal administration.

It is not my intent to minimize either the efforts or the objects of those who so ardently contended for the right to the trial by the peers of one involved in litigation. The social organization of the English polity early in the 13th century, composed as it was of a dominant and a subservient element, necessitated the establishment of safeguards to the rights of the dependent majority that was forced to the extremity of an absolute reliance upon the caprice of feudal lords for the determination of its legal controversies. And no more valuable concession has ever been vouchsafed a liberty loving people than was the right granted by the recognition of the Magna Charta of having the relative merits of opposing interests authoritatively determined by a judicial body composed of members whose interests were identical with those before them for consideration. Agrarians through economic necessity the English villeins and serfs were engaged solely by the problems attendant upon agricultural pursuits, and not as yet confronted with the issues presented by a complex civilization were permitted to devote their unified energies to the subjugation of the regnant feudal power, the excessive domination of which threatened to stifle their existence.

Realizing that the ignorance of judicial tribunals would prove as disastrous to their interests as their open hostility and antagonism had been, the original protagonists of the jury provided that its members be selected from a narrowly circumscribed vicinage and required of them as a prerequisite to their officiating an acquaintance not only with the parties litigant, but with the facts germane to the issue as well.

We have clung with pathetic earnestness to the unrecognizable remnants of that original system, and we engage in mimicry by selecting the members of our modern juries from political subdivisions hundreds of square miles in area and peopled by thousands of inhabitants. We permit changes of venue that frequently operate to remove a cause from its original jurisdiction to a remote section of the state to be tried before a body of jurors selected from that same remote section. We have evolved a comprehensive legal procedure that not only permits but encourages the exclusion from a modern jury of one possessing the slightest knowledge of the facts he is supposedly summoned to determine. Abysmal ignorance constitutes a condition precedent in the qualification of jurors, and that ignorance must be established to the satisfaction of contending counsel, else the prospective juror is summarily dismissed from the body to which he would, if permitted, have brought enlightenment.

The one redeeming virtue that avails to the slightest degree in mitigating the crime of hypocrisy of which our legal procedure has convicted us, is the possession of finer sensibilities that prompt us to admire the worthiness of principles we have so violently mutilated.

The province of the jury, indeed its sole province, is the discernment of fact. It is true that the existence of a fact does not depend upon the knowledge of its existence by those whom it affects. The principles of gravitation have been operating since the creation of bodies, yet they were unknown to man until their comparatively recent discovery by Newton. A judicial trial is unique in this, that no fact can exert an effect that does not come within the knowledge of the tribunal engaged in the trial. A fundamental principle of legal science is the absolute disregard of a fact not proved.

The ascertainment of fact is the most important as well as the most difficult task imposed upon man by reason of his existence, and in judicial trials the true discernment of fact is an absolute essential to the administration of justice. The difficulties attendant upon the search after truth are legion, even when no human agencies interpose obstructions in the path of him who searches, and when all the means accessible to man in the acquiring of knowledge are at his free disposal. To one engaged in such a task, nature lends the assistance of the senses, of the instincts and of the intellect. The jury is aided by none of these agencies. Enclosed by the walls of the court room, it is called upon to decide the existence of facts of which neither the senses, the instincts nor the intellect of its members have apprised them. Entirely inexperienced and untrained they are opposed in their hampered investigation of fact not only by the absence of natural agencies, but by the designing and effective machinations of experienced counsel and the deliberate deceptions of violently interested partisans. The evidence that would give light to the juror in his blind quest is carefully concealed by one party and the other as strenu-

ously attempts to disclose it. The result is a distorted presentation of fact that evidences the astuteness of respective counsel and the miscarriage of justice that follows as an aftermath is indisputable evidence of the commendable efficiency of the particular attorney by whom it was occasioned.

I am among the many who recognize the existence of impossibilities, and I hold it as impossible for a man or a woman unfortified by experience and entirely uninformed, to successfully engage in an investigation of fact when possessed of no other means of knowledge than the testimony of interested witnesses and the perverted deductions drawn from it by counsel who are precluded from impartiality by the ethics of their profession.

Susceptible as those are who have not frequently come into contact with the artful practices peculiar to the court room, the members of the jury are as easily deceived as they are prejudiced. Their innate sympathies are readily elicited by carefully coached and instructed witnesses. Their credulity admits the use of simulated tears and feigned passions as tools of deception by which the stream of justice is frequently perverted and the means by which that stream is as frequently polluted before it leaves its fountain head.

This result is entirely a natural one. The difficult task of hearing conflicting testimony and of synthesizing and reconciling it, of judging witnesses and the truth of their statements by their appearance and demeanor and of deducing the truth or falsity of particular testimony by the coherence or the incoherence of the whole are not proper tasks to be delegated to those not possessing the highly developed faculties necessitated by the nature of the duty imposed. Rather is it a task for jurists whose talents have been trained and whose faculties have been developed in the schools of theory and of experience. To such jurists, educated in the clear perception of truth, the assumed attitudes and rehearsed testimony of principal and witness might prove interesting, but hardly convincing. From them, certainly, the methods employed to prostitute justice within her own temples would receive the severe condemnation they merit.

It would appear to one unfettered by the bonds of tradition, that the governmental entity that has thrown the mantle of its protection about the physical well-being of its subjects by providing for the adequate preparation of the doctors of medicine, would with due regard for consistency, require as complete a preparation of those upon whom directly and arbitrarily it imposes the obligation of disposing of the lives and fortunes of the same citizenry. More especially would this seem appropriate when it is remembered that one involved in litigation is permitted no choice in the selection of those to whom the disposition of his sacred rights is delegated.

What a frail security the jury affords to those compelled to depend upon it for the protection of their natural and acquired rights! The members of the jury take their places in the jury-box, and in that moment they are presumed to have ceased functioning in any other capacity than that of judges of fact. They are expected to devote their entire attention and the mental effort of which they are capable to the calm and minute examination of facts in which they are interested neither directly or indirectly. Summarily summoned to discharge duties entirely foreign to all previous experience, they enter upon those duties without even a realization of their gravity or importance, prejudiced and embittered by the fact that they have been called from the pursuit of other tasks which are to them of far greater moment than is the legal difficulty in the solution of which they have been compelled to act.

It is regrettable that we are not governed more closely after the pattern of a Utopia in which each citizen would consider the discharge of a duty to the public a personal pleasure. At present, however, we function as a government under the disadvantages occasioned by the majority of citizens persisting in the belief that the "Government was made for man, not man for the government." And as long as this belief is entertained the average juror will continue to be incensed by the demands made upon him by a body politic which, in return for his tax remittances, he expects to govern him efficiently and to decide his own and his fellow citizens' contentions justly without the necessity of his immediate attention. Doubtless the juror would be interested by an explanation of the theory by which he is denied the privilege of selecting capable agents to whom to delegate the powers of judicial administration and by which he is granted that privilege in other phases of governmental activity.

Let us, however, indulge in the presumption that a juror has dispelled any prejudices he might have entertained towards both the court that commanded his presence and the particular party or parties whose legal difficulties necessitated it. We will presume further that he has excluded from his consideration the perplexities and worries, the personal concerns and private interests with which, by reason of his mere existence, he is occupied. We are yet confronted by the fact that irrespective of the supernatural powers we have imputed to the juror under consideration, he remains human. Being human he is subjected to human frailties and delinquencies and possesses human passions and desires, as all men do who have not by sustained and arduous discipline subjected them in the furtherance of purposes to which they have devoted themselves. Never having received the training and preparation prerequisite to the proper discharge of the obligations of a judicial officer, the juror is very likely to leave the province of a disinterested trier of fact, and to indulge in the delectable satisfaction of imposing on a helpless litigant a penalty for contending for rights or for defending principles to which the juror is opposed.

The development of a complex civilization has occasioned a wide divergency in the interests of mankind, and it is difficult to conceive of interests that could form the subject of legal action that would not meet with either the sympathy or the antipathy of some member of an indiscriminately selected jury. It is entirely probable that in many instances such natural prejudices exist without the conscious knowledge of their possessors and though they be concealed they effectively exercise a detrimental influence.

The juror is not subjected, however, to influences emanating from innate causes alone. The persons or interests that will be affected by the

decision of the juror attempt in turn to influence it. The methods employed are varied, but seldom legitimate. Every juror is the potential balance of power in the jury of which he is a member. In matters involving the financial interests of the unscrupulous his favorable verdict possesses a monetary value proportionate to the amount involved in the controversy. In a cause decisive of life or liberty that decision assumes a priceless value, as priceless to him who seeks it as life or liberty itself.

Moral turpitude is a thing to be as seriously considered as it is deeply regretted. The average citizen (and a jury is composed of average citizens) is, of course, a man of small means. If a man be susceptible of corruption, the financial independence permitted him by the possession of such a limited capital would make the procurement of his moral aberration comparatively easy of accomplishment. To one not content with possibilities is left a consideration of the far too numerous concrete instances of such aberrations, that remove the corruptibility of a juror from the possibilities of theory to the certainties of actuality.

Mercenary concerns are not the only concerns that operate to influence the juror. All men possess desires and aspirations, and a sudden transition from the status of a member of the laity to that of a judicial officer does not avail to free the possessors from their influence. And in the seclusion of the deliberation room we find that men fawn for each others favor and in solemn conclave they barter their self-respect for the approbation and countenance of their fellows. Unlike the judge who occupies a position that relieves him from the necessity of making concessions for reasons personal in their nature, the juror is frequently controlled by the sentiment or the supposed sentiment of those with whom he associates. And frequently the decision of a cause does not so much depend upon the opinion of the juror as upon the opinion the juror is convinced is entertained by the public or some particular portion of it. We have protected our judges so far as we have been able from the influences subversive of their duties. The only defense with which we have provided the juror avails only in preventing those influences from being openly and directly exerted. We impute, by implication, more moral worth and a greater reliability to the unprepared and unprotected juror than we do to the judicial officer that we select because of his possession of qualifications for the office he occupies.

Too long has the effete and sterile jury system been permitted to tug at the throat of the nation's judiciary as it sinks under the smothering deluge of the obloquy of those it was designed to serve. Too long has ignorance been permitted to sit ensconced in the places of judicial administration where knowledge is so sorely needed. Too long has the lament of the Shakesperian character been echoed, "Justice has fled to brutish beasts and men have lost their reason."

The complaint is not without cause, when to the observer of court room procedure relative to the trial by jury is presented the spectacle of contending attorneys employing the finesse of a temporarily prostituted science. Officers of the court engaged in the attempt to secure as judges of their cause those whose frailities and delinquencies are so pronounced as to justify the presumption that adroit manipulation and the flagrant disregard of principles will avail to cloud the issues and to obscure the merits of the controversy. Ultimate and infallible justice might occupy a place in the theories of moral philosophers. Its place in the trial by jury defies detection. The opprobrium that is constantly being directed at the legal profession is not without justification when for Judas gold its members subordinate God-given intellects in the furtherance of interests they momentarily make their own and utilize the deficiencies of the jury as an agency to prevent justice.

Perhaps in the Millennium man will be endowed with the heavenly virtues that will enable him to hear without prejudice and to decide without malice the vital concerns of another with whom his own selfish desires have not identified him. In that happy age, however, I am convinced that a more reliable agency than the judicial jury will dispense the eternal principles of justice. Unfortunately we do not live in the Millennium, and subjected as we are to the deficiencies of man in the administration of justice as we are in every other of life's activities, we must seek a method of judicial trial that will minimize the effect of those deficiencies. And by adopting the most perfect agencies at our disposal we will be enabled to approach nearer a realization of perfection, the complete realization of which those same human limitations will ever make impossible.

In order that my criticism of the jury system may not be considered as entirely destructive, I would propose the establishment of a state judiciary composed of three separate divisions.

Of the courts of the judicial system proposed there would be as many courts of the first division established in each county of the state as necessity would require. Each of them would consist of three members elected for a term of eight years by the voters of the county in which they officiated.

The tribunals of this first division would constitute the original trial courts for all legal controversies irrespective of their character or the nature of the matters involved, except those cases that by the present provisions of adjective law are cognizable solely by municipal courts or by the federal judiciary. They would be empowered to sit in bank in the trial of those cases in which a jury trial is now granted as the privilege or as a matter of right of either party to the controversy, and by a concurrence of two of their members to render decisions on both facts and law involved in them. In the trial of a cause in which the present provisions of law do not authorize a trial by jury, or in which neither party desires a trial by the court sitting in bank, but one member of the tribunal would sit in the hearing and his decision therein would be the decision of the court. In the trial of cases these courts would examine all witnesses and would hear all the evidence legally produced before them, and their members would exercise the rights and assume the obligations of both judge and jury under the present judicial system.

From the decisions of the trial courts there would be granted to a dissatisfied litigant the right of an appeal to an appellate tribunal. This court would consist of five members elected for a term of office of sixteen years by a vote of the state electorate. Such a number of these appellate courts would be established as would be necessary to the efficient and expeditious discharge of their duties. They would sit in bank in the determination of ap-

peals, and by a concurrence of three of the members of any one of them, would sustain, modify or reverse the decisions of the lower courts on questions of both fact and law from which the appeal was made.

For the purpose of its review the appellate court would have before it a full and complete transcript of all the evidence adduced at the original trial and a record of all proceedings had prior to the appeal, the exceptions and arguments of the respective attorneys made at the first hearing, together with the decisions of the court. Arguments on appeal would be presented in the form of briefs and the privilege of an oral argument would be granted at the request of either party.

From the decision of an appellate court there would be the right of an appeal to the last and final court of the state. This court would be composed of seven members elected to their office for life by the general vote of the state. It would be vested with the authority to review on appeal the decisions of the appellate courts on questions of both fact and law. For the purpose of its review it would be given at the expense of the appellant the transcript of the evidence and the record of both former trials together with the exceptions, the arguments and the objections of the attorneys and the decisions rendered by the lower courts and the reasons for them. Arguments on the last appeal would be made in writing.

The decision of the final court would be decisive of the controversy, save in those instances in which there exists a constitutional privilege of an appeal to a federal tribunal.

The members of the courts suggested would receive adequate compensation for the experience and talent required of them, and the qualifications demanded of candidates would be such as to insure the election of capable and worthy jurists. Each of the members would be subjected to the right of recall by their constituents and to the power of impeachment by the state legislature.

I could not hope to present in the limited space within which I am confined, an adequate exposition of a complete judicial system. The procedure of the different courts, the nature or character of cases that would be considered as justifying the right of appeal, the appellate jurisdiction of the first of the state courts over the decisions of municipal courts, and the authority of the separate courts in the issuing of the different writs—these questions and countless similar ones are technical in their nature and may well be left to the lawmaking bodies charged with the duty of their solution. The object to be obtained is the substitution of the trained and efficient jurist for the untrained and inefficient juror.

The undoubted desirability of the innovation is evidenced by the constitution of the Supreme Court of the United States, embodying, as it does, every salient feature of the system advocated. That tribunal in the exercise of its original jurisdiction is unhampered by a jury in the determination of the most momentous questions confronting us as individuals or as a nation. Its members are appointed and the appointments are ratified by the agents of the people acting as the spokesmen of the people, and those members are subject to impeachment by representatives of the people.

The principles by which that court of final appeal and sovereign power functions, have made it the ideal of the nations of the world, and the application of those principles to municipal, state and federal trials would of necessity effect a felicitious result, and the benefits attendant upon the innovation would more than recompense for the difficulties it would occasion.

Such a system of judicial tribunals composed of members accountable to the people for their every official act, with the tenure of their offices dependent upon the will of the people and with their decisions subjected to revision by supervising tribunals, would comprise the advantages of a judiciary amenable to the will of the governed and concomitantly free from the necessity of political activity. An activity derogatory to the interests of justice.

The criticism that a tribunal possessed of the power to decide both facts and law in all controversies would be more easily corrupted and with more difficulty restrained from an excessive exercise of its power than would the jury, does not possess the requisites of a valid contention. The checks to which the proposed judiciary would be subjected would make them far more worthy of confidence than are the "twelve good men and true" who possess no responsibility of a definite nature whatsoever, and whose only limitations are prescribed by idle and ineffectual theory. For upon the jury there is exerted no counter-influence and it occupies a unique status among democratic institutions in that its acts are not subjected to the investigation of a revisory power possessed of authority to vitiate them. A cause may, and frequently does, run the gamut of every state and federal court, and throughout that eventful course the characteristics with which that cause has been impressed by the trial jury, continue as deciding factors in its subsequent disposition.

This inordinate effect of the jury's verdict is sanctioned by the provisions of law relative to procedure, that preclude an appellant court from disturbing the findings of a trial court on questions of fact in which there has been a conflict of evidence. To an adolescent mind the fact is apparent that a revisory power over a decision as to a fact admitted by both parties concerned does not constitute an effective deterrent to any injurious effect that such a decision might occasion.

To the objection that the expense necessitated by the maintenance of a judicial system composed of a large number of permanently retained officials would be so exorbitant as to preclude its possibility, I would reply that the increased efficiency of such a judiciary would materially lessen the cost of litigation not only to the public but to the litigant as well. When one contemplates the enormity of the number of jury trials conducted throughout the nation in the course of a single year, a realization of the expense necessitated becomes startlingly apparent. The disagreements of the jury, so prevalent under the present procedure, render unavoidable numberless new trials and the summoning of new juries before which to try them. Each new trial accompanied by its inevitable complement of added expense.

I presume to affirm moreover, that were a system once inaugurated by which a cause could be heard only by trained and experienced jurists whose eyes could not with facility be blinded to its

merits and with whom no subterfuge or chicanery could avail, there would result a material decrease in the number of cases brought to trial. It is to be remembered that attorneys, well acquainted with the proved inefficiency of the jury, readily counsel the institution of a legal action in which a jury trial is obtainable. Were such an attorney compelled to plead that same cause before a jurist or group of jurists whose knowledge of law and the practices of the judicial trial was as comprehensive as his own, he would be exceedingly more reluctant to engage with his client to either defend or establish rights of the existence of which even the attorney is extremely doubtful.

Jurisprudence is unique in that unlike other sciences to which man has devoted his attention it has failed in a compliance with the universal law of selection. I am not ignorant of the potency of tradition. Generation succeeds generation, the lives and the destinies of each controlled by the inexorable customs of a preceding age. Civilization, however, does not wholly depend upon the experience of the past, but rather has that experience been utilized as material in its superstructure, so incorporated therein as to make possible its removal without detriment to the edifice when the dictates of an advanced reason demand the substitution of newer and more appropriate matter.

The verities of yesterday are the proved fallacies of today, and the children often assiduously avoid that for which the fathers as ardently sruggle. And when man fails to avail himself of the privilege of selecting from the accumulated knowledge of his predecessors that which he is convinced will prove beneficial and of rejecting that which will operate to his detriment, he will suffer under the self-imposed penalty of living not *by* but *in* the light of yesterday. Any human activity that does not, either in the principles employed or in the method of their application, conform to the changing circumstances and conditions of the objects it affects, or fails in a development that will facilitate the advance of man towards the ultimate perfection to which he aspires, will lose its vitalizing force, will be excluded eventually from the category of human concerns and will ultimately be destroyed by the force of the progress it did not attend.

I have availed myself of the prerogative which is mine as one who, having dedicated his life and his few talents to the science of jurisprudence, is desirous that the object of his efforts be at least worthy of so deficient an exponent. And it has been with a deference to the precedents that I have disregarded and with a realization of the limits within which I am confined that I have attempted to draw from a consideration of the past and a contemplation of the future a substantiation for the conviction that the institution of the trial by jury must in the interests of justice be completely extirpated from the factors of judicial administration.

No one realizes more clearly than myself the impossibility of the establishment of a judiciary that will administer infallible justice. One entertaining a belief so sanguine would have disregarded the verity that imperfect causes must ever effect imperfect results. Until man attains perfection, the institutions of which he is a component part and by which his existence is ordered, will continue to be imperfect.

It has been said that "He who has lived a day has lived an age, for each day is the pupil of every yesterday." That which belonged to yesterday has perished with its sun, and the only value of the past is to be found in the lessons it has taught us.

"The old order changeth" and no longer should we tolerate the rule of the oligarchy that sits in the twelve chairs affixed at the bar of every court. For its members rule from a throne with no foundation. They are co-regents possessing not the attributes of kings. And the system that has made them sovereign must be relegated to the discarded customs that strew the pathway of man's progress and that remain the concern alone of the historian.

Lord Sterndale and the Maybrick Case

"It is inevitable that the death of the Master of the Rolls should recall the much-canvassed case of Regina v. Maybrick, Liverpool Assizes, 1889, in which he was junior counsel for the defense. Sir Charles Russell led for the prisoner and the late Judge Addison, K. C., appeared for the Crown. In this case Mr. Justice Stephen adopted the new departure of permitting a defended prisoner to make from the dock a statement on her own behalf; hitherto only undefended prisoners had been allowed to address the jury on a trial by indictment, although the accused was permitted to make a statement before a justice at the preliminary proceedings. Mrs. Maybrick, acting on the advice of Pickford, had reserved her defense when before the magistrates; but Sir Charles Russell thought she ought to have an opportunity of making a statement at the trial. Probably any judge, except Sir James Stephen, would have declined to hear her, on the ground that the application was irregular if not unprecedented; but that broadminded, if somewhat austere, master of criminal law decided not to refuse a request based on obvious equity and fair dealing. This exercise of his discretion set a precedent which was thereafter followed by all other judges, and the prisoner was habitually given an opportunity of making a statement from the dock—whether or not defended by counsel—until the Criminal Evidence Act of 1898 conferred on accused persons the right of giving evidence."—*The Solicitors' Journal & Weekly Reporter, August 25, 1923.*

The Unsentimental Woman Juror

"Speaking at a house dinner of the Ladies' Imperial Club on November 29, Sir Ernest Wild, K. C., said that women were, he thought, in judicial matters, less emotional and less sentimental than men. He confessed that he was a convert to the principle of women serving on juries. Women convicted very much more readily than men if it were right to do so. Nowadays men got justice. In the old days a pretty girl got up to attract, and the case was over, so that men never really got justice. With privileges came duties, and it was therefore wrong to raise an outcry against women being hanged for brutal murders. 'Personally,' he added, 'I would not hang anybody. I would have the lethal chamber, but if you are going to hang men, you must hang women too."—*The Law Journal,* Dec. 8, '23.

The American Citizenship Movement, commendable as it is, is too frequently in the direction of the country or the rocking chair on election day.

TERMS FOR RESTATING THE LAW

While Theoretically It Would Appear That Absolute Accuracy of Definition Could Never Be Attained, Practically It Seems Possible Greatly to Minimize Diversity of Interpretation as to a Few Fundamental Terms

By GEORGE W. GOBLE
Professor of Law, University of Illinois

IT IS indeed true, as Professor Kocourek has pointed out in the columns of this Journal,[1] that legal terminology has taken on a new significance since the organization of the American Law Institute, which proposes to undertake the work of re-stating the law. The first requisite for a scientific re-statement of the law is a statement of the terms to be employed in its re-statement. If after the law has been re-stated, the terms used are subject to a variety of interpretations, not much is gained by the re-statement. It is true that inerrent definition is next to impossible. To state a principle of law requires first a definition of the terms employed in stating the principle, and to give the definitions of the terms used in stating the principle, may require first a defining of the words employed in the definitions, and so on *ad infinitum*. Theoretically it would seem that absolute accuracy in definition could never be attained, but practically it seems possible that diversity of interpretation may be greatly minimized with respect to the meaning of a few fundamental terms which must be used in any re-statement of the law. It seems possible that terms which describe, as precisely and exactly as may be, what one person *may* or *can* or *must* do, with respect to another person, may be defined in terms reasonably simple and understandable. Professor Kocourek has made a good beginning in this direction in his Alphabet of Legal Relations recently published in this Journal,[2] and it is to be hoped his efforts along this line will arouse the interest the subject deserves.

In the article referred to, the author presented a table, embodying the legal relations, Claim—Duty, Power—Liability, Immunity—Disability and Privilege—Inability, accompanied by definitions and illustrations. No substantial objection can be urged to the first three pairs of relations proposed. This terminology has now become pretty generally accepted. Right might be substituted for Claim, but Claim has the merit of being less ambiguous than Right, and of leaving the latter as a generic term to cover all of the advantageous relations.

But as intimated above, the serious objection to the proposed scheme of relations is the apparently limited application the author gives to the term Privilege, and its correlative. He seems to limit Privilege to an exception from a Duty. He says a Privilege is "a Capability which departs from the general rule." If X has a capability to do an act, but most persons do not have such capabilities then, according to Professor Kocourek, X has a Privilege. For example, where X has the "right" of deviation with respect to the land of S, X has a Privilege to go upon S's land, because most other persons have duties to stay off. Circumstances have placed X in a peculiar situation, and the law extends to him a favor, and where before he was under a Duty to stay off S's land, he now has a Privilege to go on.[3]

If the above is a correct statement of Professor Kocourek's proposal, it is submitted that his Privilege is not a basic legal relation, and whether the above is a correct statement or not his use of the term is too ambiguous, and the connotation too slippery to be of value in a system of fundamental legal terminology.

The connotation given to the term Privilege by the late Professor Wesley N. Hohfeld is much to be preferred.[4] Hohfeld used Privilege to indicate *freedom of Duty* irrespective of whether the relation was an exception to, or in accordance with the general rule, so that according to Hohfeld the relation described above would be a Privilege for no other reason than that there is a freedom of Duty. Hohfeld's Privilege, it is seen, is much more inclusive and comprehensive than Kocoureck's.[5]

The criticisms above suggested will be dealt with separately.

1. Kocourek's Privilege is not basic. If we say that a certain relation of A towards B is a Privilege, because it is a case of the law especially favoring A, and that A's favor is an exception to a rule of law, then we are determing A's relation, not by his actual connection or association with B, but by a collateral and extrinsic thing, viz., the fact as to whether the applicable rule of law is general or exceptional. That is, even though we may know exactly how the law will relate A and B with respect to the question at issue, it cannot be known whether the relation should be called a Privilege, a Liberty or something else, until we know whether A's situation falls under the general rule or under an exception thereto.

Basic legal relations answer such questions as, what *can* A do or not do, what *may* A do or not do, or what *must* A do or not do, from the standpoint of the law. We are not concerned here with the reason *why* A may do an act, or whether his permission to do it, is or is not in accord with some general rule of law. What is the general rule now, may become the exception tomorrow, while the actual relations of the parties remain the same.

To make this criticism clear suppose we consider the two following situations. In one case the court by its judgment says to A, "You may drill a hole in Blackacre," and in the other the court says to B, "You may drill a hole in White-

1. The Alphabet of Legal Relations (1923) IX A. B. A. Journal 237.

2. Note 1 *supra* and also Wanted: A Lawyer's Phrase for Legal Capabilities and Constraints (1923) IX A. B. A. Jour. 25.

3. See Kocourek, Basic Jural Relations (1923) 17 Ill. L. Rev. 515.

4. Hohfeld (1923) Fundamental Legal Conceptions 38.

5. For clear and concise definitions of right, privilege, power, immunity and their correlatives see Corbin, Legal Analysis and Terminology (1919) 19 Yale Law Jour. 163. Professor Corbin's well thought out suggestions in this article deserve the careful consideration of those who are to assume the responsibilities of re-stating the law.

acre." Now, if a legal relation is determined by answering the question, "What will organized society, acting through its appointed agents do?"[6] then it seems true that the court has pronounced the existence of the *same* legal relation in both of these cases, and if we are to speak in basic terms, we should use the same word to describe A's relation to his opponent, as we do to describe B's relation to his opponent. Let us call this relation a Privilege. Suppose further that by an investigation of the facts, upon which the judgments were based, we find that in the first case A had a lease permitting him to drill on Blackacre for oil, and that in the second case B was the fee simple owner of Whiteacre. By reason of this disclosure Kocourek would say A has a Privilege, because he has been favored with an exception to the general rule that persons shall not trespass on the land of others, but that B has no Privilege because he is operating under the general rule that a landowner can do what he pleases on his own land. It is to be noted that notwithstanding that different sets of facts have given rise to the court's conclusions, the court has nevertheless actually *done* exactly the same thing, and has answered the question, "What will organized society do?" in exactly the same way in both cases. Why should a terminology be adopted which would require us to say that a *lessee* has a legal Privilege to drill for oil on the *leased* premises, but that an owner does not have a legal Privilege to drill for oil on the *owned* premises?

If by Professor Kocourek's Privilege it is necessary to consider other matters than what the court *actually does* in any case, in order to determine its existence, will it not be necessary to revise our definition of what a legal relation is?

2. Professor Kocourek's Privilege is ambiguous and difficult of identification. To indorse it would lead to endless controversy as to what it meant. This defect may be illustrated.

Suppose A is the fee simple owner of Blackacre. He grants B a license to walk across Blackacre. This, by both Kocourek and Hohfeld is a legal Privilege. Kocourek says it is so because all ordinary persons are under duties to stay off Blackacre, or that the usual rule is that one must not trespass on the land of another, but here B is favored by an exception. It is this special favor which the law shows to B that marks the relation as a Privilege. Hohfeld says it is a Privilege merely because B is free of a Duty to stay off. But Hohfeld would also say A, the owner of Blackacre, has a legal Privilege to walk across his own land, because he is free of a Duty to stay off. Kocourek says this is not a Privilege, but a Liberty, a non-legal-content situation. This is true, he would say, because an owner of land as a rule does not have a Duty to stay off his own land. He would say A is not especially favored or given an exception by the law, but has the liberty possessed by all landowners.

But it is submitted there is just as much exception in the last case as in the first and that by the apparent meaning of Kocourek's Privilege, the latter should be called a Privilege as well as the former. In organized society man is not usually born an owner of an estate, any more than he is an owner of a license. All owners are in a sense the special favorites of the law. All of the beneficial relations they may have with respect to property are exceptions to the relations of everybody else with respect to that property. Why should we say that when A grants B a license, he grants him an exception, but when he grants him the whole of the estate he does not?

Professor Kocourek says B's "right" to deviate upon the land of A, because of an impassable public way, or B's "right" as a licensee to walk across the land of A, is a Privilege, because by a general rule, *others* may not trespass on the land of A. The circumstance of a blocked highway in the one case, and the grant in the other, has placed B in a situation different from that of other people. But may it not be similarly said that A has a Privilege to walk across his own land because by a general rule *others* may not trespass on the land of A; that the circumstance of ownership has placed A in a situa- different from that of other people?

"Owners may walk across their own lands" is perhaps a general and not an exceptional proposition. But it is equally true that the principle, "Persons meeting with an obstruction in a highway may deviate on to lands of another," is general and not exceptional. It depends upon the angle from which one looks at the situation envolved as to whether the principle applying is a general rule or an exception. Looked at from the point of view of the person claiming the Privilege, the rule is general, i.e., it is general as to all persons falling in his class or circumstances. But looked at from the point of view of others it may be called an exception.

It may be that Professor Kocourek means that when a license is granted to B, the latter is exempt from a *general* Duty, owing by society to A, to keep off the land. But the answer to this is that there is no such general Duty, and it is from the pitfalls of such statements, that it is hoped a scientific legal terminology will rescue us. Instead of a *general* Duty, there is a separate and distinct Duty owed by *each member* of society, and the grant of the license refered to above, has the effect of destroying B's separate Duty to stay off the land, and of creating in its stead a Privilege to go on. This is not an exception to a general Duty, but an extinction of B's Duty while the Duties of all others remain intact.

It is therefore believed that an acceptance of Kocourek's Privilege would not promote certainty and definiteness in legal expression, but would have just the opposite effect. It seems to the writer that the proposed definition of a Privilege requires the inclusion of many situations which Kocourek believes to be clearly excluded as non-legal-content situations or liberties. A basic term ought to be more definite in its connotation.[7]

If the proposed definition of Privilege pro-

6. Kocourek has agreed that this is the test. See 4 Am. Law Sch. Rev. 815.

7. Hohfeld pointed out that the attribute of *special advantage* given to the term Privilege is not justified by usage. He says: "With such antecedents, it is not surprising that the English word 'privilege' is not infrequently used, even at the present time, in the sense of a special or peculiar legal advantage (whether right, privilege, power or immunity) belonging either to some individual or to some particular class of persons. There are, indeed, a number of judicial opinions recognizing this as one of the meanings of the term in question. That the word has a wider signification even in ordinary non-technical usage is sufficiently indicated, however, by the fact that the term '*special* privileges' is so often used to indicate a contrast to ordinary or general privileges. More than this, the dominant specific connotation of the term as used in popular speech seems to be mere *negation of duty*. This is manifest in the terse and oft-repeated expression, 'That is your privilege,'—meaning, of course, 'You are under no duty to do otherwise.'

"Such being the case, it is not surprising to find, from a wide survey of judicial precedents, that the *dominant* technical meaning of the term is, similarly, negation of *legal duty*."

hibits its use in describing what a land owner may do on his own land, the precise statement of many legal principles with respect to such operations will be difficult, if not altogether impossible. This phase of the problem may be illustrated by reference to those difficult questions which are now so frequently arising under oil and gas leases, with respect to the relations between the lessee, owner, adjoining owners and their lessees.[8]

The objections to the proposed use of Privilege apply with equal force to its correlative Debility. There is also the additional objection that the term Debility is unknown and of no significance in legal terminology. Hohfeld's term "no-right" as cumbersome as it is, seems to be the most significant word for the place, unless we adopt Kocourek's substitute of Claim for Right in which event No-claim would be the proper word.

Professor Kocourek in his proposed table of legal relations uses Right as a generic term for all of the advantageous relations and Ligations for all of the disadvantageous relations. Right in this sense is justified by usage and perhaps no attempt should be made to uproot usage in this respect. But Professor Kocourek's appeal for Ligations is unconvincing. Here is another word unknown in our legal terminology. As satisfactory as the word may seem from an etymological standpoint, it never would be approved by the American Law Institute, nor if approved by it, used by the profession. As usage should perhaps control the selection of Right as a generic term for all of the advantageous relations, so usage should dictate the generic term for the disadvantageous relations. *Obligation* is the word now used for this purpose, and no substantial reason is seen why its use for such purpose should not continue. The objection raised to it because of its Roman connection is not vital.[9] It is true Liability and Duty have been used in this sense by the courts, but they are ruled out for the reasons set forth by Professor Kocourek.

It seems to the present writer that the definitions proposed by Professor Kocourek in the articles referred to above, are in substantial accord with those proposed by Professor Corbin, in his article, Legal Analysis and Terminology[10] with the exception of the definition given to Privilege and its correlative. For reasons set forth above it is believed Corbin's definition of Privilege is preferable.

Accepting Kocourek's substitution of Claim for Right, and following his suggestion that Right be used in the broad generic sense for all of the advantageous relations, but modifying his connotation of Privilege to accord with that given to it by Hohfeld and Corbin, rejecting his new word Ligation as a generic term for all the disadvantageous relations, and substituting therefor the much used term Obligation, the result is a scientific as well as a practicable system of basic terminology. The table would then read as follows:

Rights (Advantageous Relations)	Claim	Duty	Obligations (Disadvantageous Relations)
	Privilege	No-claim	
	Power	Liability	
	Immunity	Disability	

8. See Summers, Legal Interests in Oil and Gas (1921), 4 Ill. L. Quart. 19 and ibid (1923) 4 Ill. L. Quart. 167 where the convenience of the use of Privilege in Hohfeld's sense, in dealing with such problems, is illustrated.

9. Kocourek refers to this objection in (1923) IX A. B. A. Jour. 25.

10. (1919) 29 Yale L. Jour. 163.

LETTERS OF INTEREST TO THE PROFESSION

An Apology and a Reply to Mr. Maltbie on Valuation

COLUMBIA, University, N. Y., Dec. 20.—To the Editor.—May I be given space to apologize publicly to Mr. William H. Maltbie for anything I may have said in my June review article which seemed to reflect on his integrity or intelligence? My reflections were the fruit of irritation at what I conceived to be a glaring error, and would have been quite out of place even if I had been correct in attributing to him the opinion that the difference of earning capacity of two companies was *the* measure (instead of *a* measure) of their difference in value. As I was incorrect in attributing this opinion to him, all color even for the reflections was lacking. Considering the provocation, I must add that the temperate language of Mr. Maltbie's reply (in the August number) is worthy of all praise.

Although my language was quite uncalled for, I still think Mr. Maltbie to be in error, and should like the courtesy of your columns for a brief statement of my grounds. Meanwhile Mr. Leslie Craven has contributed two very able articles on the subject (in the November and December numbers) which seem to me to contain the same error, and I should like to reply to both at the same time.

Mr. Maltbie contends that the very simplest formula for value is V=a+bR, where R is the return and where a and b are known quantities independent of R. If so, he is quite correct in saying there is no vicious circle involved in holding the company entitled to a fair return upon V, but *not* correct in implying that this formula affords the company the same degree of protection as it receives in a condemnation case. In the latter, it has at the end of the process a sum of money equal to the value of all that was taken from it. In every case where net earnings are reduced, on the contrary, though the new and reduced return will constitute a fair percentage of a+bR (meaning R under the old rates), yet, since R is reduced to R′, the value under the new earnings will no longer be a+bR but a+bR′, which is less. So, though Mr. Maltbie's formula, if correct, avoids the vicious circle, it does not save the company from *all* shrinkage of value.

Nor does he convince me that the value is indeed expressed by the formula V=a+bR instead of V=R/f. If the latter is the correct expression, he admits that he and the Supreme Court are reasoning in a circle. How does he prove it incorrect? (1) By asserting that "no investor, utility, commission, or court has ever accepted it" (i. e., the "definition" of value as a capitalization of earnings). (2) By contending that an investor, before buying, considers, in addition to earning capacity, other items, which may be roughly grouped under cost of reproduction, actual cost, and risk. As to (1)—to say that V=R/f, is not to define (the definition of value on which he and I presumably

concur, is *the amount for which the property would change hands in a sale*), but is to make an assertion, the grounds for which will be repeated presently. If he means that no commission or court has ever *asserted* that the value is a capitalization of earnings, he is wrong. For a very clear and convincing assertion to that effect, I refer him to the opinion of Chairman Stevens in *Fuhrmann* v. *Cataract &c. Co.*, 3 P. S. C. (2d district, N. Y.) 656 at 681. As for (2)—it is true that an investor might consider reproduction cost and actual cost, but only for the light they throw on the magnitude of R/f. The more "perfect" is competition, the more likely will it be that the earnings will be so regulated by competition that R/f will conform to reproduction cost less depreciation; and actual cost may be some evidence of reproduction, hence useful for checking up the accuracy of the former figure. I cannot imagine why else an investor should care about either figure. There is no satisfaction in owning a plant merely because it *would* cost or *did* cost a great deal to construct it, unless one of those facts indicates correspondingly high prospective earnings. Nor would anyone sell a plant the more readily because of low actual or reproduction cost unless those facts pointed to lower earning capacity. One would of course consider the risk, but that is already done in determining the magnitude of f in the formula. In short, in all normal cases, the buyer's only motive is to get the earnings, or to sell at an advance; and the latter would be impossible unless *somebody* anticipated greater earnings.

If my formula rather than Mr. Maltbie's is the correct expression of economic value (*and only in that case*), it follows that Mr. Craven is correct in his contention that to allow the company a fair return on its value will afford it the same protection that the compensation requirement affords it in a condemnation proceeding. But it affords this protection by defeating entirely the power to reduce net earnings. This Mr. Craven does not avow, but he implies it when he contends that to reduce a railroad's net earnings *by means of the "recapture" clause* would confiscate part of its value. It would seem to follow that to reduce them *by means of rate regulation* would have the same effect, and what becomes of the power to reduce net earnings? (His full contention is, that to "recapture" the excess above a fair return on anything less than value would "confiscate," while to take away the excess above a fair return on the value itself would defeat the recapture clause, since there could not be any such excess). Elsewhere, it is true, he asserts that the additional net earnings are the result, not the cause, of the "differential" value of the railroad which has the superior location. If so, no amount of reduction of earnings would seem to have any confiscatory effect on the value; yet Mr. Craven maintains emphatically that a reduction by recapture *would* and a reduction by regulation *might* confiscate value. He cannot have it both ways. Elsewhere, likewise, Mr. Craven thinks it might be permissible, in the case of a local monopoly, to reduce the earnings to a fair return on *cost*. But it must be quite clear that to reduce a monopoly's net earnings would deprive it of something of economic value, whether or not the earnings previously exceeded a fair return on cost. To deny the government's power to destroy any element of value by rate regulation is not simply to defeat the recapture clause of the Transportation Act, but to defeat the power to reduce net earnings altogether.

This forces one, however reluctantly, to take issue with Justice Hughes's intimation that the company may not be deprived of any *value* by rate regulation, and with Justice Brewer's opinion that the company receives the same protection in a rate case that an owner receives in condemnation proceedings. The reason for the difference is not mysterious. The function of the power to reduce is to remove so much of the company's economic advantages as may be adjudged "undue"; and the removal of that advantage necessarily takes something of value from the company, without compensation. To adjudge that a man's farm is essential for some public purpose is not to adjudge that that man is in an economic position which needs correction; and the purpose of the compensation is to leave him in the same economic position as before, relative to the rest of the community. Since the function of regulation is to alter the relative economic positions which would result from *unregulated* property rights, regulation must of necessity require a reappraisal of the economic incidents of ownership. As a very eminent and conservative economist has stated in another connection:

> The dogma of an unrestricted right of property, and the belief in the expediency of the exercise of that right without a jot or tittle of abatement have been shaken beyond repair. The rights of property must approve themselves on examination in each particular case, and submit to modification where a balance of gain for the public can be reasonably expected.—Taussig, *Principles of Economics*, 2d ed., Chap. 44, §5 (vol. 2, p. 103).

To suggest that such a reexamination involves the destruction of private property is to show little faith in the power of that institution to withstand scrutiny. At any rate, if the power to reduce is to be retained, the institution must be reexamined, or else the rights of owners continue to be cut down unavowedly and without plan, as they are at present. This results because the court purports to adopt a rule which, if correctly applied, would preclude all reduction; it is not seen that the rule precludes reduction, since reductions are frequently sanctioned, and it is not seen that this is due to error in ascertaining the facts to which the rule is applied. Where the error will come in a particular case nobody can predict, and the investors are subjected to much more uncertainty than they would be under a rule which stated clearly what elements of value might be destroyed and what elements might not. Since Mr. Craven originally wrote his articles, the Supreme Court has given sanction to a practice which, on pp. 802-3 of the December number, Mr. Craven condemns as involving just this uncertainty. See *Georgia Ry. & P. Co.* v. *RR. Commission of Georgia*, 43 Sup. Ct. 680.

Let me correct, in closing, an error Mr. Maltbie makes as to my position. My conclusion is *not* "that rates must be fixed upon prudent investment." If he cares to re-read the last paragraph of my June article he will see that I am aware of many objections to an unqualified acceptance of that position. My point is simply that each argument for or against this base must be made on its own merits, not as a deduction from the erroneous premise that the courts protect a fair return on the economic value. ROBERT L. HALE.

An Overheated French Advocate

"A curious instance of the vehemence of the French advocates is recorded in the paper containing the report of a late trial. The Counsel for the widow Boursier, in the course of the first quarter of an hour, worked himself into such a heat that he was forced to stop; and the proceedings were suspended while he went out to take a walk on the terrace of the Courthouse, accompanied by his wife and daughter."—*Ex.*

STATE AND LOCAL BAR ASSOCIATIONS

Alabama Elects Commissioners Under Unified Bar Plan—Massachusetts Opposes Limiting U. S. Supreme Court's Power—Missouri Discusses Proposed Constitutional Amendment—Successful Meeting of Nebraska Association

ALABAMA

Board of Commissioners Elected Under Unified Bar Plan Passed Recently by Legislature

An event of peculiar interest to the profession was the recent election in Alabama of the Board of Commissioners for the unified Bar, created by a recent act of the legislature of that state. The Board is to be the governing body of the Bar and has extensive disciplinary powers. A note giving the substance of the plan for a unified bar in Alabama appeared in the JOURNAL for August, 1923.

Following is the complete list of the commissioners elected, one from each judicial circuit in the state, as announced by the special committee composed of the clerks of the Supreme and appellate courts and the reporter of decisions for both courts, which conducted the election and made the official canvass of the returns:

First circuit, T. J. Bedsole, Grove Hill; Second circuit, C. E. Hamilton, Greenville; Third circuit, B. deG. Waddell, Seale; Fourth circuit, Henry F. Reese, Selma; Fifth circuit, R. H. Powell, Tuskegee; Sixth circuit, Bernard Harwood, Tuscaloosa; Seventh circuit, J. K. Dixon, Talladega; Eighth circuit, A. J. Harris, Decatur; Ninth circuit, John A. Lusk, Guntersville; Tenth circuit, Thomas J. Judge, Birmingham; Eleventh circuit, John H. Peach, Sheffield; Twelfth circuit, W. S. Huey, Enterprise; Thirteenth circuit, Norville R. Leigh, Mobile; Fourteenth circuit, R. A. Cooner, Jasper; Fifteenth circuit, J. R. Thomas, Montgomery; Sixteenth circuit, John H. Disque, Gadsden; Seventeenth circuit, J. F. Aldridge, Eutaw; Eighteenth circuit, L. L. Saxon, Columbiana; Nineteenth circuit, L. F. Gerald, Clanton; Twentieth circuit, O. L. Tompkins, Dothan; Twenty-first circuit, F. W. Hare, Monroeville.

CALIFORNIA

Executive Committee Adopts Plan for Increasing Interest in Association—Self-Governing Bar Movement

The executive committee of the California Bar Association recently indorsed a plan prepared by President Jeremiah F. Sullivan providing for holding district meetings in various parts of the state for the purpose of increasing interest in the association and its work and promoting the solidarity of the Bar. The meetings are to be under the direction of the vice-presidents and it is expected that the contacts established at them will result in a considerable increase in the membership of the Association. The committee on incorporation of the State Bar was granted authority to send out as an official document a pamphlet prepared by the committee setting forth the advantages of a self-governing Bar. Suggestions by O. K. Cushing of San Francisco for the correction of popular misconceptions of the principles of our government, for improving public understanding of and confidence in the Bar and for other cognate purposes were approved and steps will be taken to carry them out. The plan includes, among other things, addresses by members of the Association to schools, churches, clubs and organizations of various kinds.

MASSACHUSETTS

State Bar Association Adopts Strong Resolution Opposing Plan to Limit Supreme Court's Power

The annual meeting of the Massachusetts Bar Association was held in Springfield on Saturday, November 10, 1923. Reports of committees were presented and the subject of jury service in general and the question of jury service for women were discussed in view of the fact that a commission is studying those subjects under a resolution of the legislature.

The officers elected for the ensuing year were as follows: President, Thomas W. Proctor, Newton; Vice-Presidents, Frederick Dodge of Belmont and William Caleb Loring of Boston; Treasurer, Charles B. Rugg, Worcester; Secretary, Frank W. Grinnell, Boston; Executive Committee—Horace E. Allen, Springfield; Samuel C. Bennett, Weston; Edward E. Blodgett, Newton; Harold S. R. Buffinton, Fall River; Francis J. Carney, Cambridge; Edward T. Estey, Worcester; Frank M. Forbush, Newton; James J. Kerwin, Lowell; Edward A. McMaster, Bridgewater; Frederick W. Mansfield, Boston; Michael A. Sullivan, Lawrence; Edwin G. Norman, Worcester; John G. Palfrey, Sharon; Robert C. Parker, Westfield; Felix Rackemann, Milton; James M. Rosenthal, Pittsfield; Wilbur E. Rowell, Lawrence; Philip Rubenstein, Boston; Homer Sherman, Charlemont; Fitz-Henry Smith, Boston; James W. Sullivan, Lynn.

The following resolution was adopted:

> Resolved, that the Massachusetts Bar Association is opposed to any constitutional or statutory change in or restriction of, the power or authority of the Supreme Court of the United States with respect to the constitutionality of acts of Congress or to the manner in which its decisions shall be reached.

The matter was brought up for discussion by a report of the Executive Committee adopting that view and signed by twenty-two out of the twenty-four members and without dissent.

MISSOURI

State Association Debates Proposed Amendment to Constitution Providing for Judicial Council—Standards of Legal Education Approved

The meeting of the Missouri Bar Association on December 14 and 15 was the most successful which we have had for several years. The president of the American Bar Association, Mr. R. E. L. Saner, was present and delivered an address which brought forth expressions of praise. Mr. Manley O. Hudson, professor of Law at Harvard

Law School, addressed the Association with regard to the Permanent Court of International Justice. He displayed detailed knowledge of the subject and made an exceedingly favorable impression. Former Governor Herbert S. Hadley, now chancellor of Washington University, delivered an excellent address with regard to the American Law Institute and Legal Education.

The main debate before the Association concerned the proposed amendment number seven to the Constitution of the State. This amendment is one of twenty-one proposals which will be voted upon in Missouri February 26. It proposes changes in Article six of our present Constitution to a considerable extent. It would create a judicial Council consisting of three members of the Supreme Court, three members of the Courts of Appeals, and three of the circuit judges. This Council would have authority to regulate practice and procedure and make rules therefor, subject to the veto power of the General Assembly. The Council would also have power to transfer judges from place to place as needed in order to keep up with the judicial work.

The amendment met with strong opposition and also hearty support. By a vote of forty-six to forty-one the Association refused to approve it. The main opposition arose over the refusal of the Constitutional Convention to create a third division of the Supreme Court and over abolishing the present Supreme Court commission of four members. Those in opposition did not think that the plan of aiding the Supreme Court by the use of circuit judges a desirable one. There seemed to be no very great amount of objection to a judicial Council as such, nor to giving a judicial Council the power to regulate practice and procedure, nor even to transferring circuit judges to other circuits where the docket might be congested.

The Association again approved the American Bar Association standard for legal education.

Mr. Guy A. Thompson, Liberty Central Bank Building, St. Louis, Missouri, former president of the Bar Association of St. Louis, was elected president. Mr. Thompson proved to be an exceptionally good president of the Bar Association of St. Louis and it is fully expected that he will do very much to advance the cause of the Missouri Bar Association during the ensuing year.

KENNETH C. SEARS.

NEBRASKA

Annual Meeting of State Association Marked by Success in Every Feature—President Saner and Ex-Senator Lewis Speak—Impressions of Foreign Courts

The Nebraska State Bar Association met in Lincoln December 28th and 29th and held the most successful meeting in its history in point of attendance, interest and the splendid spirit manifested by those present. Representatives of the bar from all parts of the state participated in the meetings of Friday and Saturday and a majority of those in attendance remained over for the banquet the evening of Saturday.

The program opened with the annual address of the president, E. P. Holmes of Lincoln, one of the oldest lawyers of the Nebraska Bar. The learned judge's address was received with enthusiasm and was an intellectual treat from the opening sentence to the closing word.

Honorable T. C. Munger, judge of the U. S. District Court for the District of Nebraska, spoke for 20 or 30 minutes on his impression of foreign courts. During six months absence in 1923 he visited courts in Japan, Philippine Islands, India, Italy, Austria, Germany, France and England. A close observer with a happy faculty of seeing the interesting distinctions between the courts, his address was thoroughly enjoyed.

The evening of the 28th the Lancaster County Bar Association (Lincoln) entertained the members at a smoker at the Lincoln University Club. This was a unique occasion. In addition to some vaudeville stunts and music by University musicians, the local bar association put on a sketch entitled, "The Supreme Court of Nebraska in Conference," which was a burlesque of several members of the court of last resort in the state. Lawyers will appreciate the opportunity that was given by this little sketch to refresh the memories of the distinguished judges of days when they were on the other side of the bar.

Some nineteen district judges attended the annual banquet of the judges in advance of the University Club entertainment.

On reports from the Committees on Legislation and Judiciary it was agreed that these committees should from this time forward be appointed for terms of two years, in order that the same committee should recommend legislation and continue in office until the annual meeting following a legislative session, so that the committee could initiate, carry forward and report upon laws recommended by the Association for enactment by the legislature.

A standing Committee on Citizenship was created and plans for furthering the patriotic efforts of the American Bar in educating the people to revere and support our Constitution were outlined for the new committee.

Honorable R. E. L. Saner, president of the American Bar Association, addressed the assembled lawyers in the forenoon of Saturday, December 29th and was given a most cordial reception. His address was masterly, delightfully delivered and was highly approved by the lawyers in attendance. As an evidence of the appreciation of the Bar of Nebraska for Mr. Saner and his splendid address, he was unanimously elected an honorary member of the Nebraska Bar Association. This is the first time this honor has been accorded any visiting speaker.

Ex-Senator J. Hamilton Lewis of Illinois spoke at the afternoon session of December 29th on "Our International Policy of Tomorrow." It is needless to say that he held the audience through an hour of interesting discussion of international law as it exists today and closed with suggestions for the future.

At the banquet in the evening, Judge Fred Shepherd of the District Court of Lancaster County presided as toastmaster. Mr. Dana Van Deusen, City Attorney of the City of Omaha, President Saner and Senator Lewis were the banquet speakers. The program was snappy and interesting throughout and the serious portions of the addresses of Messrs. Saner and Lewis were accorded hearty applause.

THE WINNING AMERICAN PEACE AWARD PLAN

Jury of Award, Headed by Hon. Elihu Root, Announces Decision—Expresses Hope That First Fruit of Mutual Counsel and Cooperation Among Nations Which Will Result from Adoption of Plan Will Be Prohibition of Manufacture and Sale of War Materials—Author's Name to Be Revealed After Referendum—Ballot

WITH deep satisfaction I present for the consideration and vote of the American people the plan selected by the Jury as entitled to the American Peace Award under the conditions.

The Award brought forth 22,165 plans. Since many of them were the composite work of organizations, universities, etc., a single plan often represented the views of hundreds or thousands of individuals. There were also received several hundred thousands of letters which, while they did not submit plans, suggested in almost each instance a solution of the peace problem.

The Jury had therefore before it an index of the true feeling and judgment of hundreds of thousands of American citizens. The plans came from every group in American life. Some were obviously from life-long students of history and international law. Some were from persons who have studied little, but who have themselves seen and felt the horror of war—or who are even now living out its tragedy.

However unlike, they almost all express or imply the same conviction: That this is the time for the nations of the earth to admit frankly that war is a crime and thus withdraw the legal and moral sanction too long permitted to it as a method of settling international disputes. Thousands of plans show a deep aspiration to have the United States take the lead in a common agreement to brand war in very truth an "outlaw."

The plans show a realization that no adequate defense against this situation has thus far been devised; and that no international law has been developed to control it. They point out that security of life and property is dependent upon the abolition of war and the cessation of the manufacture of munitions of war.

Some of the plans labor with the problem of changing the hearts of men and disposing them toward peace and good will; some labor to find a practicable means of dealing with the economic causes of war; some labor with adjusting racial animosities, with producing a finer conception of nationalism, etc., etc.

Through the plans as a whole run these dominant currents:

That, if war is honestly to be prevented, there must be a right-about-face on the part of the nations in their attitude toward it; and that by some progressive agreement the manufacture and purchase of the munitions of war must be limited or stopped.

That while no political mechanism alone will insure cooperation among the nations, there must be some machinery of cooperation if the will to cooperate is to be made effective; that mutual counsel among the nations is the real hope for bringing about the disavowal of war by the open avowal of its real causes and open discussion of them.

Finally, that there must be some means of defining, recording, interpreting and developing the law of nations.

The Jury of Award unanimously selected the plan given below as the one which most closely reflected several of these currents.

The Honorable Elihu Root, chairman of the Jury of Award, then prepared the following forward-looking statement indicating that the mutual counsel and cooperation among the nations provided in the selected plan may lead to the realization of another—and not the least important—of the dominant desires of the American public as expressed in the plans:

"It is the unanimous hope of the Jury that the first fruit of the mutual counsel and cooperation among the nations which will result from the adoption of the plan selected will be a general prohibition of the manufacture and sale of all materials of war."

The purpose of the American Peace Award is thus fulfilled: To reflect in a practicable plan the dominating national sentiment as expressed by the large cross-section of the American public taking part in the Award.

I therefore commend the winning plan as unanimously selected by the Jury of Award, and Mr. Root's statement of the first object to be attained by the counsel and cooperation provided in the plan, to the interest and the widest possible vote of the American people.

EDWARD W. BOK.

January, 1924.

FULL TEXT OF PLAN

THE complete manuscript of Plan No. 1469 Providing for Cooperation between the United States and other nations "to achieve and preserve the peace of the world" is given below, including the author's reasoning:

Plan Number 1469

There Is Not Room for More Than One Organization to Promote International Cooperation

Five-sixths of all nations, including about four-fifths of mankind, have already created a world-organization, the purpose of which is "to promote international cooperation and to achieve international peace and security."

Those nations cannot and will not abandon this system which has now been actively operating for three and a half years. If leading members of the United States Government ever had serious hopes that another association of nations could be formed, such hopes were dispelled during the Washington Conference by plain intimations from other Powers that there is not room for more than one organization like the League of Nations.

The States outside the organized world are not of such a character that the United States could

hopefully cooperate with them for the purpose named.

Therefore, the only possible path to cooperation in which the United States can take an increasing share is that which leads toward some form of agreement with the world as now organized, called the League of Nations.

By sheer force of social international gravitation such cooperation becomes inevitable.

The United States Has Already Gone Far in Cooperation With the League of Nations

The United States Government, theoretically maintaining a policy of isolation, has actually gone far, since March 4, 1921, toward "cooperation with other nations to achieve and preserve the peace of the world."

The most familiar part of the story is the work of the Washington Conference, wherein President Harding's Administration made a beginning of naval disarmament, opened to China a prospect of rehabilitation and joined with Great Britain, Japan and France to make the Pacific Ocean worthy of its name.

Later came the recommendation that the United States should adhere to the Permanent Court of International Justice.

Not long after that action President Harding wrote to Bishop Gailor:

"I do not believe any man can confront the responsibility of a President of the United States and yet adhere to the idea that it is possible for our country to maintain an attitude of isolation and aloofness in the world."

But since the proposed adhesion to the Permanent Court would bring this country into close contact at one time and point with the League of Nations, and since such action is strenuously opposed for exactly that reason, it is pertinent to inquire not only how much cooperation with the League and its organs has been proposed during the life of the present Administration, but also how much has been actually begun.

Officially or Unofficially the United States Is Represented on Many League Commissions

The United States Government has accredited its representatives to sit as members "in an unofficial and consulting capacity" upon four of the most important social welfare commissions of the League, viz.: Health, Opium, Traffic in Women and Children, and Anthrax (Industrial Hygiene).

Our Government is a full member of the International Hydrographic Bureau, an organ of the League. Our Government was represented by an "unofficial observer" in the Brussels Conference (Finance and Economic Commission) in 1920. It sent Hon. Stephen G. Porter and Bishop Brent to represent it at the meeting of the Opium Commission last May.

Our Public Health Service has taken part in the Serological Congresses of the Epidemics Commission and has helped in the experimental work for the standardization of serums.

Our Government collaborates with the League Health Organization through the International Office of Public Health at Paris, and with the Agriculture Committee of the League Labor Organization through the International Institute of Agriculture at Rome.

In February, 1923, Secretary Hughes and President Harding formally recommended that the Senate approve our adhesion to the Permanent Court under four conditions or reservations, one of which was that the United States should officially participate in the election of judges by the Assembly and Council of the League, sitting as electoral colleges for that purpose.

Unofficial cooperation from the United States with the work of the League includes membership in five of the social welfare commissions or committees of the League, in one on economic reconstruction, and in one (Aaland Islands) which averted a war. American women serve as expert Assessors upon the Opium and Traffic in Women Commissions.

Two philanthropic agencies in the United States have between them pledged more than $400,000 to support either the work of the Epidemics Commission or the League inquiry into conditions of the traffic in women and children.

How Can Increasing Cooperation Between the United States and the Organized World Be Secured?

The United States being already so far committed to united counsels with League-agencies for the common social welfare, all of which have some bearing upon the preservation of world peace, the question before us may take this form:

How can increasing cooperation between the United States and the organized world for the promotion of peace and security be assured, in forms acceptable to the people of the United States and hopefully practicable?

The United States Can Extend Its Present Cooperation With the League's Social Welfare Activities

Without any change in its present policy, already described, the United States Government could, first, show its willingness to cooperate similarly with the other humane and reconstructive agencies of the League. To four of these agencies that Government had already sent delegates with advisory powers. It could as properly accept invitations to accredit members with like powers to each one of the other welfare commissions. It has already received invitations from two of the latter.

It is, secondly, immediately practicable to extend the same kind of cooperation, whenever asked to do it, so as to include participation in the work of the commissions and technical committees of the Labor Organization. The record shows that such cooperation is already begun.

The single common purpose of all these committees is the collection and study of information, on which may be based subsequent recommendations for national legislation.

All conventions and resolutions, recommended by the first three congresses of the International Labor Organization, have already been laid before the Senate of the United States and, without objection, referred to the appropriate committee. No different procedure would have been followed if the United States were a member of the Labor Organization of the League.

An Immediate Step Is Adherence to the Permanent Court

A third immediately practicable step is the Senate's approval of the proposal that the United

States adhere to the Permanent Court of International Justice for the reasons and under the conditions stated by Secretary Hughes and President Harding in February, 1923.

These three suggestions for increasing cooperation with the family of nations are in harmony with policies already adopted by our Government, and in the last case with a policy so old and well recognized that it may now be called traditional.

They do not involve a question of membership in the League of Nations as now constituted, but is cannot be denied that they lead to the threshold of that question. Any further step toward cooperation must confront the problem of direct relations between the United States and the Assembly and Council of fifty-four nations in the League.*

In Actual Operation the League Employs No Force

The practical experience of the League during its first three and a half years of life has not only wrought out, in a group of precedents, the beginnings of what might be called the constitutional law of the League, but it has also shifted the emphasis in activities of the League and foreshadowed important modifications in its constitution, the Covenant.

At its birth the Covenant of the League bore, vaguely in Article X and more clearly in Article XVI, the impression of a general agreement to enforce and coerce. Both of those Articles suggest the action of a world-state which never existed and does not now exist. How far the present League is actually removed from functioning as such a State is sufficiently exhibited in its dealings with Lithuania and Poland over Vilna and their common boundary, and with Greece and Italy over Corfu.

Experience in the last three years has demonstrated probably insuperable difficulties in the way of fulfilling in all parts of the world the large promise of Article X in respect to either its letter or its spirit. No one now expects the League Council to try to summon armies and fleets, since it utterly failed to obtain even an international police force for the Vilna district.

Each Assembly of the League has witnessed vigorous efforts to interpret and modify Article X. In the Fourth Assembly an attempt to adopt an interpretation of that Article in essential agreement with the Senatorial reservation on the same subject in 1920 was blocked only by a small group of weak States like Persia and Panama, which evidently attributed to Article X a protective power that it possesses only on paper.

Such States, in possible fear of unfriendly neighbors, must decide whether the preservation of a form of words in the Covenant is more vital to their peace and security, and to the peace and security of the world, than the presence of the United States at the council table of the family of nations.

As to Article XVI, the Council of the League created a Blockade Commission which worked for two years to determine how the "economic weapon" of the League could be efficiently used and uniformly applied. The Commission failed to discover any obligatory procedure that weaker Powers would dare to accept. It was finally agreed that each State must decide for itself whether a breach of the Covenant has been committed.

The Second Assembly adopted a radically amended form of Article XVI from which was removed all reference to the possibility of employing military force, and in which the abandonment of uniform obligation was directly provided for. The British Government has since proposed to weaken the form of requirement still further.

Articles X and XVI, in their original forms, have therefore been practically condemned by the principal organs of the League and are today reduced to something like innocuous desuetude. The only kind of compulsion which nations can freely engage to apply to each other in the name of Peace is that which arises from conference, from moral judgment, from full publicity, and from the power of public opinion.

The Leadership of the United States in the New World Is Obviously Recognized by the League

Another significant development in the constitutional practice of the League is the unwillingness of the League Council to intervene in any American controversy, even though all states in the New World except three are members of the League.

This refusal became evident in the Panama-Costa Rica dispute in 1921 and in the quarrel between Chile, Peru and Bolivia, a quarrel which impelled the last two States to absent themselves from the Third Assembly, wherein a Chilean was chosen to preside.

Obviously the League intends to recognize the leadership of the United States in the New World precisely as the United States claims it. This is nothing less than the observance of an unwritten law limiting the powers and duties of the League Council, defined in Article XI of the Covenant, to questions that seem to threaten the peace of the Old World. When the United States is willing to bring the two halves of the world together for friendly consideration of common dangers, duties and needs, it will be possible to secure, if it is desided, closer cooperation between the League organizations and the Pan-American Union, already a potential regional league. It is conceivable that the family of nations may eventually clearly define certain powers and duties of relatively local significance which may be developed upon local associations or unions. But the world of business and finance is already unified. The worlds of scientific knowledge and humane effort are nearly so. Isolation of any kind is increasingly impossible, and world organization, already centralized, is no more likely to return to disconnected effort than the United States is likely to revert to the Calhoun theory of States Rights and Secession.

In Actual Operation, If Not in Original Conception the League Realizes the Principle and the Hopes of The Hague Conferences

The operation of the League has therefore evolved a Council widely different from the body imagined by the makers of the Covenant. It can employ no force but that of persuasion and moral influence. Its only actual powers are to confer and advise, to create commissions, to exercise inquisi-

*Fifty-seven States, including Germany, are members of the International Labor Organization of the League. There are about sixty-five independent States in the world.

tive, conciliative and arbitral functions, and to help elect judges of the Permanent Court.

In other words, the force of circumstances is gradually moving the League into position upon the foundations so well laid by the world's leaders between 1899 and 1907 in the great international councils of that period. The Assemblies of the League and the Congresses of the International Labor Organizations are successors to the Hague Conferences.

The Permanent Court has at least begun to realize the highest hope and purpose of the Second League Conference.

The Secretariat and the Labor Office have become Continuation Committees for the administrative work of the organized world, such as the Hague Conference lacked resources to create but would have rejoiced to see.

The Council, resolving loose and large theories into clean-cut and modest practise, has been gradually reconciling the League, as an organized world, with the ideals of international interdependence, temporarily obscured since 1914 by the shadows of the Great War.

No one can deny that the organs of the League have brought to the service of the forces behind those ideals an efficiency, scope and variety of appeal that in 1914 would have seemed incredible.

It is common knowledge that public opinion and official policy in the United States have for a long time, without distinction of party, been favorable to international conferences for the common welfare, and to the establishment of conciliative, arbitral and judicial means for settling international disputes.

There is no reason to believe that the judgment and policy have been changed. Along these same lines the League is now plainly crystallizing, as has been shown, and at the touch of the United States the process can be expedited.

In no other way can the organized world, from which the United States cannot be economically and and spiritually separated, belt the power of public opinion to the new machinery, devised for the pacific settlement of controversies between nations and standing always ready for use.

The United States Should Participate in the League's Work Under Stated Conditions

The United States Government should be authorized to propose cooperation with the League and participation in the work of its Assembly and Council under the following conditions and reservations:

I. The United States accepts the League of Nations as an instrument of mutual counsel but it will assume no obligation to interfere with political questions of policy or internal administration of any foreign state.

The United States Will Maintain the Monroe Doctrine

In uniting its efforts with those of other States for the preservation of peace and the promotion of the common welfare, the United States does not abandon its traditional attitude concerning American independence of the Old World and does not consent to submit its long established policy concerning questions regarded by it as purely American to the recommendation or decision of other Powers.

The United States Proposes That Moral Judgment and Public Opinion Be Substituted for Force

II. The United States will assume no obligations under Article X, in its present form in the Covenant, unless in any particular case Congress has authorized such action.

The United States will assume no obligations under Article XVI, in its present form in the Covenant or in its amended form as now proposed, unless in any particular case Congress has authorized such action.

The United States proposes that Articles X and XVI be either dropped altogether or so amended and changed as to eliminate any suggestion of a general agreement to use coercion for obtaining conformity to the pledges of the Covenant.

The United States Will Assume No Obligations Under the Versailles Treaty Except as Congress Approves

III. The United States will accept no responsibility and assume no obligation in connection with any duties imposed upon the League by the peace treaties, unless in any particular case Congress has authorized such action.

The United States Proposes That Membership Be Opened to Any Self-Governing State

IV. The United States proposes that Article I of the Covenant be construed and applied, or, if necessary, redrafted, so that admission to the League shall be assured by any self-governing State that wishes to join and that receives the favorable vote of two-thirds of the Assembly.

The Continuing Development of International Law Must Be Provided For

V. As a further condition of its participation in the work and counsels of the League, the United States asks the Assembly and Council consent—or obtain authority—to begin collaboration for the revision and development of international law, employing, for this purpose, the aid of a commission of jurists. This Commission would be directed to formulate anew existing rules of the law of nations, to reconcile divergent opinions, to consider points hitherto inadequately provided for but vital to maintenance of international justice, and in general to define the social rights and duties of States. The recommendations of the Commission would be presented from time to time, in proper form for consideration, to the Assembly as to a recommending if not a lawmaking body.

Among these conditions Numbers I and II have already been discussed. Number III is a logical consequence of the refusal of the United States Senate to ratify the treaty of Versailles, and of the settled policy of the United States which is characterized in the first reservation. Concerning Numbers IV and V this may be said:

Anything less than a world-conference, especially when Great Powers are excluded, must incur, in proportion to the exclusions, the suspicion of being an alliance, rather than a family of nations. The United States can render service in emphasizing the lesson, learned in the Hague Conference, and in thus helping to reconstitute the family of nations as it really is. Such a conference or as-

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sembly must obviously bear the chief responsibility for the development of new parts of the law of nations, devised to fit changed and changing conditions, to extend the sway of justice, and to help in preserving peace and security.

STATEMENT OF JURY OF AWARD

The Jury of Award realizes that there is no one approach to world peace, and that it is necessary to recognize not merely political but also psychological and economic factors. The only possible pathway to international agreement with reference to these complicated and difficult factors is through mutual counsel and cooperation which the plan selected contemplates. It is therefore the unanimous opinion of the Jury that of the 22,165 plans submitted, Plan Number 1469 is "the best practicable plan by which the United States may cooperate with other nations to achieve and preserve the peace of the world."

It is the unanimous hope of the Jury that the first fruit of the mutual counsel and cooperation among the nations which will result from the adoption of the plan selected will be a general prohibition of the manufacture and sale of all materials of war.

ELIHU ROOT, *Chairman*
JAMES GUTHRIE HARBORD
EDWARD M. HOUSE
ELLEN FITZ PENDLETON
ROSCOE POUND
WILLIAM ALLEN WHITE
BRAND WHITLOCK

Author's Name Not to Be Revealed Untif After Referendum

In order that the vote may be taken solely upon the merits of the plan, the Policy Committee, with the acquiescence of Mr. Bok, has decided not to disclose the authorship of the plan until after the referendum, or early in February. The identity of the author is unknown to the members of the Jury of Award and the Policy Committee, except one delegated member.

The Policy Committee:

JOHN W. DAVIS,
LEARNED HAND,
WILLIAM H. JOHNSTON,
ESTHER EVERETTE LAPE,
Member in Charge
NATHAN L. MILLER,
MRS. GIFFORD PINCHOT,
MRS. OGDEN REID,
MRS. FRANKLIN D. ROOSEVELT,
HENRY L. STIMSON,
MELVILLE E. STONE,
MRS. FRANK A. VANDERLIP,
CORNELIUS N. BLISS, JR.
Treasurer.

Potency of the Monroe Doctrine

"Last Sunday was the Centenary of the Monroe Doctrine. It is being celebrated with becoming ceremonial by the political, the legal, and the academic world of the United States. Such an anniversary would be interesting in any event, but it is especially interesting today. For the Monroe Doctrine is now far and away the most potent juristic weapon which International Law has placed in the hands of any body of statesmen. Its only rival in importance is the League of Nations Covenant. And that, although in *esse* a not inconsiderable force, and in *posse*, let us hope, a still greater instrument for the regulation of international life, has not yet attained the world respect which is paid to the present-day interpretation of President Monroe's fateful presidential message."—*The Solicitors' Journal & Weekly Reporter*, Dec. 8, '23.

THE PLAN IN BRIEF

Proposes

I. That the United States shall immediately enter the Permanent Court of International Justice, under the conditions stated by Secretary Hughes and President Harding in February, 1923.

II. That without becoming a member of the League of Nations as at present constituted, the United States shall offer to extend its present cooperation with the League and participate in the work of the League as a body of mutual counsel under conditions which

1. Substitute moral force and public opinion for the military and economic force originally implied in Articles X and XVI.
2. Safeguard the Monroe Doctrine.
3. Accept the fact that the United States will assume no obligations under the Treaty of Versailles except by Act of Congress.
4. Propose that membership in the League should be opened to all nations.
5. Provide for the continuing development of international law.

American Bar Association Journal
Chicago, Illinois

Do you approve the winning plan *in substance?* Yes ☐ No ☐
(Put an X inside the proper box.)

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Please print.

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City ..... State.....

Are you a voter?.....

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If you wish to express a fuller opinion also, please write to the American Peace Award